Working Effectively With Tribal Governments

Resource Guide
August 1998

DISCLAIMER

This document is designed solely to inform EPA personnel about EPA's Indian Program and its implementation. It is not intended to substitute for the requirements contained in EPA statutes or regulations. EPA may update this document as appropriate.

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CHAPTER ONE: UNDERSTANDING NATIVE AMERICANS

I. WHY LEARN ABOUT NATIVE AMERICANS?

There are two basic reasons for acquiring an understanding of Native American communities. The first reason is that the President of the United States has directed all federal agencies to do so to promote EPA's and the federal government's Indian policy: "The head of each executive department and agency shall be responsible for ensuring that the department or agency operates within a government-to-government relationship with federally-recognized tribal governments."[1] The second reason for doing so is that all EPA Administrators since 1984 have directed EPA employees to do this through implementation of EPA's Indian Policy: "The fundamental objective of the Environmental Protection Agency is to protect human health and the environment. The keynote of this effort will be to give special consideration to tribal interests in making Agency policy, and to insure the close involvement of tribal governments in making decisions and managing environmental programs affecting reservation lands."[2]

A less authoritative reason for getting to know something about Native American communities—but a no less important reason—is that, by knowing these communities, EPA will learn how to work with them in the best ways possible. A great deal can be learned through this resource guide and in EPA's training classes. However, EPA employees should realize that their learning will be enhanced if, as individuals, the employees actually get to know Native American people at a personal level and at a community level. The landscape and the natural resources are important to become familiar with, but there is more to knowing these communities than that. To the extent possible, EPA employees should learn as much as possible about cultural values, beliefs and practices, community history, culture, government, economies, and other infrastructure and community systems. Cultural awareness and sensitivity is required to work with such an interestingly diverse, but collectively unique, society of Americans. Native American people are industrious and have a raw determination to maintain their ways of life. They also are courteous, hospitable, and willing to share. One can expect vigorous and enthusiastic support for environmental management development.[3]

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1 Presidential Memorandum for the Heads of Executive Departments and Agencies (April 29, 1994).

2 U.S. Environmental Protection Agency, EPA Policy for the Administration of Environmental Programs on Indian Reservations (November 8, 1984). (Reaffirmed by Administrator Browner, Memorandum EPA Indian Policy (March 14, 1994)).

3 Veronica E. Velarde Tiller, Ph.D. (*Jicarilla Apache*), Tiller's Guide to Indian Country: Economic Profiles of American Indian Reservations, iv (1996).

II. DISCUSSING "NATIVE AMERICANS"

"Native American" is a general term used in this resource document. The term is used in a very broad sense to describe an ethnically distinct group of American citizens.[4] They are distinct from other Americans in that, as an ethnic group, Native Americans are considered indigenous to North America. They are not, as a group, descendants of the European or other immigrants who began colonizing this continent in the 16th century. The term as used here, includes "American Indians," "Indians," "Alaska Natives," "Eskimos," and "Aleuts." Sometimes the term "Indian" or "American Indian" also is used expansively to include "Alaska Native," "Eskimos," and "Aleuts." Although these terms can be used in an ethnologically descriptive sense, they also have legal and political meaning. An "Indian" also is described as a person with some amount of Indian blood who is recognized as such by the person's tribe or community.[5]

An "Indian tribe," as used in this resource document, is generally a community of Indians who are ethnologically similar, but who as a community, also exist in a legal-political sense. Historically, the federal government has determined that it will recognize particular groups of Indians as political entities, or "Indian tribes," pursuant to its authority under the Indian Commerce Clause of the United States Constitution.[6] However, keep in mind that not all tribes are federally-recognized. This subject is discussed in *Chapter 2: Federal Indian Law*.

A. Native Hawai'ians

"Native Hawai'ian" people can also be described as Native American because they are indigenous to their areas and they are not descendants of the European colonizers. For purposes of this resource document, Native Hawai'ians are not included as Native Americans. The Native Hawai'ian community has a different relationship with the U.S. Government. As a group, they are not recognized as a legal, political entity or "government." Nevertheless, Native Hawai'ians are described as a discrete group in the Native American Programs Act of 1974 (NAPA). They number in the 150,000 range and they have maintained a distinct cultural identity. NAPA has helped them to receive federal funds to support education, health, and civil rights initiatives. The Native Hawai'ians are attempting to restore land bases and establish formal recognition of a federal trust responsibility and government-to-government relations.

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4 Tim Giago (*Dakota*), publisher of the Rapid City, South Dakota-based *Indian Country Today*, an important Indian advocacy newspaper, states the paper's policy, as published December 4, 1991 in the "Notes from Indian Country" editorial: "We use 'American Indian,' 'Indian,' or 'Native American,' but we prefer to use the individual tribal affiliation when possible."

5 American Indian Lawyer Training Program, Inc., Indian Tribes As Sovereign Governments, a Sourcebook On Federal-Tribal History, Law, and Policy, 34 (1988).

6 *Id.* at 34. Other countries are recognized as "nations," separate and apart from the "nation" of the U.S.A. Under the U.S. Constitution, "States" are considered political entities and under State constitutions, counties and cities are considered political entities.

III. THE DEMOGRAPHIC LANDSCAPE

A. Native American Populations Are Increasing

Rather than facing extinction, as many believe, the Native American population is growing. When European explorers arrived in North America in the late 15th century, there were at least a million people already on the continent. Some estimates range as high as 15 million or more. By 1890, 400 years later, the Native American population had been reduced to less than half a million, decimated by European diseases and warfare. Today their numbers have grown again. The 1990 census figures showed that 1.9 million people in the United States considered themselves to be American Indian, Inuit (Eskimo), or Aleut. This is about 0.8 percent of the total U.S. population.[7] Many Native Americans believe that the 1990 census grossly undercounted Native Americans. The U.S. Census Bureau acknowledges an undercount of 4.6 percent. More notably, however, the Bureau acknowledges an underestimate of the numbers living in tribal areas by 12.2 percent.[8]

B. The Geographic Distribution of Native American Communities

Native American people and their tribes are very different from one another, which makes it difficult to refer to them as one "Indian community." In reality they are many communities scattered geographically throughout the United States and most particularly in the western states. Native American people live in every state in the union, in small towns, villages, big cities, on reservations, and off reservations. Four states (all in the West) have Indian populations of 100,000 or more: Oklahoma, California, Arizona, and New Mexico. The six States where Native Americans make up 5 percent or more of the total population are Alaska, New Mexico, Oklahoma, South Dakota, Montana, and Arizona.[9]

Some of the most rapid population increases have taken place in Michigan, Texas, Florida, and Colorado. In addition, New England states (especially Maine) showed a major increase in the Indian population during the 1970s. There is probably no single explanation for this but there has been a move toward greater awareness of, and pride in, ethnicity in the last two decades and there are tribes that have received federal recognition in recent years. [10]

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[7] James B. Reed and Judy A. Zelio, States and Tribes, Building New Traditions, National Conference of State Legislatures, (NCSL), 2 (November 1995).

[8] U.S. Department of Housing and Urban Development, Office of Policy Development and Research, Assessment of American Indian Housing Needs and Programs: Final Report, Thomas G. Kingsley, et. al, 8 (May 1996) (Also, see discussion of "tribal areas" later in this Chapter).

[9] *Id.* at 2.

[10] *Id.* at 2.

1. Tribal Areas

For purposes of this resource guide, "tribal area" is a generic term adapted from concepts used by the U.S. Census Bureau to discuss where Native Americans live. It includes American Indian reservations, Alaska Native Villages, and other special types of areas that represent ongoing centers of tribal culture. Some of these special areas are state-recognized American Indian reservations, California rancherias, tribal-jurisdictional statistical areas, and tribal-designated statistical areas.[11] An assessment of the population and other trends in these areas reveal some interesting observations:

- The bulk of the Native American population *is not* gradually shifting away from reservations to metropolitan areas. The indication is that cultural ties to tribal areas remain strong. For example, urban case studies indicate that many Native Americans living in urban areas retain ties to their tribes and hope to move back when they retire. Also, 71 percent of the Native Americans who live outside of reservation areas but in the same county indicated that they would prefer to move back.

- Of the nearly 2 million Native Americans counted in the 1990 census, 37 percent lived in tribal areas and 23 percent lived in the surrounding counties. Another 31 percent were residents of metropolitan areas in the rest of the country and 9 percent lived in other nonmetropolitan areas.

- About 47 percent of the Native American population is located in areas that are remote, small, and poor with little access to employment and other opportunities.

- About 53 percent of the Native American population is located in areas that are near urban metropolitan areas, and have at least as many Indians as non-Indians living within tribal area boundaries.[12]

There are two interesting implications of this information for environmental management purposes. First, Native Americans are not leaving their homelands and, in fact, there is a likelihood that these communities will develop to accommodate their increasing numbers. Second, many Native American communities perceive that they have been and are being encroached upon by the larger non-Native American populations. Environmental management will be needed more than ever before to minimize environmental impacts as populations grow. Also, Native American environmental management systems will need to be innovative and creative in accommodating the needs of their Native American and non-Native American populations.

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[11] Kingsley, *supra*, note 8, 28-32.

[12] *Id.* at xiv-xvi.

C. Social and Economic Conditions

Native Americans are considerably younger, on the average, than the general population. In 1990, approximately 34 percent of the population was children and teenagers. The contrasting figure for the general population was 25 percent. Only about 8 percent was elderly, compared to 15 percent for the general population.

Native Americans tend to have larger families than the average. About 80 percent still live in extended-family households. Many of these households are headed by women with children. These numbers are above average. Education trends lag in Native American populations. Thirty-four percent of those over 25 never graduated from high school. Only 9 percent reported having graduated from college.

The unemployment rate is seriously high—14 percent nationally, 20 percent in tribal areas and 10 percent in urban areas. The highest rate is in the Plains area at 29 percent and the lowest rate is in Oklahoma and the Eastern regions. The average for all Americans is 6 percent.

The 1989 rate for Native Americans living below the poverty level was 34 percent, almost twice the rate for non-Indians. Poverty rates were highest in tribal areas at 36 percent and somewhat lower in metropolitan areas, non-metropolitan areas, and surrounding counties (17 to 23 percent).[13]

Finally, health statistics for Native Americans indicate their mortality rates are significantly higher than for the average population in the areas of alcoholism, tuberculosis, accidents, diabetes, flu and pneumonia, suicide, and homicide.[14]

Given the statistics provided above, Native Americans, particularly the leadership, shoulder tremendous responsibilities for achieving community well-being in addition to environmental well-being. There are many who believe incorrectly that widespread poverty in Native American communities has been mitigated by gaming activities, and there are increased pressures on Native American communities to assume a greater share of the cost of programs and services to tribal members. States covet gaming revenues and seek a piece of the pie. A 1993 study indicated that Indian gaming has proven successful in only a few areas. In many areas, locations are too remote from urban centers to be profitable. In 1997, 67 percent of over 550 federally-recognized tribes had no gaming operation. Of the tribes that did have gaming, 10 of them earned 56 percent of the gaming income. The majority of the gaming tribes earn modest incomes from their endeavors and are spending it on such things as housing and education for tribal members to alleviate the deep and persistent poverty that characterizes many Native American communities.[15]

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[13] *Id.* at 44-51.

[14] U.S. Department of Health and Human Services, Indian Health Service, Office of Planning, Evaluation, and Legislation, Division of Program Statistics, 1997 Trends in Indian Health, 5.

[15] Kingsley, *supra*, note 8, at 51-52. Also, *Tax Policy, A Profile of the Indian Gaming Industry*, Report to the Chairman, Committee on Ways and Means, House of Representatives, U.S. General Accounting Office, 5-7 (1997).

IV. CULTURAL AND HISTORICAL SNAPSHOTS

It is impossible to describe everything there is to know about Native American history and culture. Native communities are numerous and diverse as well as culturally rich and unique. However, it is possible to capture a small fraction of insight into the inner mechanisms of these societies where certain life ways have worked for many generations. Certain aspects of their lifestyles have helped Native Americans survive despite tremendous odds against them. These were such things as family and kinship, special relationships to land and other species, language, education, storytelling, traditions, customs, and religious practices. Some knowledge of these lifestyles can be helpful in understanding how to act on or accept tribally-unique ideas, customs, and practices. "Stereotyping" is also discussed to help understand how it is that this phenomenon is considered to be discriminatory.[16]

A. Beginnings

Where did they come from? The indigenous people of the Arctic and Subarctic? The people of the Great Plains, Northwest Coast, the Plateau, Great Basin, West Coast, and the Southwest? What about the people in the Prairies, Northeast, and the Southeast?

Anthropologists say that the people who populated what is now called the Americas came from Asia by sailing or walking across the Bering Strait several thousand years ago, considerably before the Norsemen "discovered" "Vineland" and long before Columbus encountered the western hemisphere lands. According to tribal traditions, the Zuni Pueblo people say that the "Sunfather," hearing the cries from the children deep within the womb of Mother Earth, struck two columns of foam at the base of a waterfall and created twin gods. Sunfather told the twins to go into Mother Earth and bring the children up to the light. They did it and that was the beginning. The Tewa and Hopi Pueblo people describe similar beginnings. In the *Encyclopedia of North American Indians*, both origin accounts are provided.[17]

This difference in origin stories raises an important sensitivity. The relationship between Native American communities and anthropologists has been somewhat uneasy for a variety of reasons. One reason is that in the past, anthropologists often appeared to disrespect tribal culture and took possession of many cultural objects. This represents a serious loss to Native American communities. Also, Native American people consider themselves to be the experts on their own culture. So, there is also an issue of "their story" and "our story." In more recent years, the anthropological community has made efforts to repatriate cultural materials, and many tribal communities have begun to value some of the work done by previous

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[16] Arlene Hirschfelder, editor, Native Heritage, Personal Accounts by American Indians 1790 to the Present, xix-xxii (1995).

[17] JoAllyn Archambault (*Standing Rock Sioux*), Edmund J. Ladd, John A. K. Willis, Encyclopedia of North American Indians, Frederick E. Hoxie, editor, 23, 445-49 (1996). Note that there are many origin stories among the many different Tribal cultures.

generations of anthropologists. Some tribes are using the work to revive their spiritual and cultural lives. The tensions nevertheless continue to exist because of the significant loss of material culture.[18]

B. Families

> It used to be that when a family saw visitors approaching, the family would automatically get up and begin cooking a full meal for the visitors. The visitors were then expected to sit and eat; if the family did not cook a meal then the visitor would be offended. Also, if the visitors refused to eat, the family who cooked the meal would be offended. Nowadays, a family will just ask the visitors, "Have you eaten yet?" If the visitors have eaten, the family would not cook. If the visitors hadn't eaten, the family would cook. Some traditions have changed to suit modern times. [19]

"With us the family was everything." Tom Johnson, an elder from the Pomo Tribe of Northern California, told a sociologist in 1940 that a man without a family would be poorer than a worm. For Native American people, this has always been true. The traditional family is large. Many Native people were and still are born into clans that relate them to many people, not just their immediate or nuclear family consisting of mother, father, and siblings. Families include grandparents, aunts who are like mothers, uncles who are like fathers, cousins who are like brothers and sisters, and married and adopted relatives who are like blood. Membership in a clan relates one to many people in close ways even though the biological connections barely exist. Clan members do not necessarily reside in the same place, but clan bonds were and are strong, obligating members to assist one another. Even distant clan members are considered relatives in times of crisis and ceremony, on both happy and sad occasions.[20]

C. Land and Its Resources

> The native peoples of the Columbia River Basin have always revered the way the Creator took special care of nature and the way nature obeyed the Creator. This was a perfect mystery. For that reason, Columbia River tribes found it easy to embrace the concept of stewardship. For them, stewardship extends respect for life beyond the dignity of the human person to the whole of creation. That respect involves responsibility to honor what the Creator provides. As long as nature is taken care of, nature will take care of the people. The tribes continue to acknowledge this traditional wisdom.

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18 Archambault, *supra* note 17, at 23, 445-49.

19 Ed Edmo (*Shoshone-Bannock*), "Finding the Best of Two Worlds; Teaching Children about Prejudices," Lakota Times (December 26, 1989).

20 Hirschfelder, *supra* note 16, at 3.

> The tribes developed 'gravel-to-gravel' management principles from this traditional wisdom. 'Gravel-to-gravel' management acknowledges the relationship between the biology of the fish, the degree of human pressures on them, and the condition of their physical environment throughout all life history stages. It is an ecologically sound approach that is at the same time sacred and regulatory.
>
> In non-Indian parlance, traditional wisdom is *systems thinking*. It is a discipline for seeing wholes, recognizing patterns and interrelationships, and learning how to structure human actions accordingly.[21]

According to many tribal accounts, Native American people feel they are related not only to family, but to homelands. Tribal views of land ownership tend to be "use" oriented. That is, people may use certain lands and resources, but they are not owned by human beings. To many Native Americans, land also is sacred. Many traditional accounts relate why certain sites are particularly sacred: a location may be the place where the creation of a specific tribe took place, or the place where an important revelation occurred, or a place through which one enters the next life. Many tribal people feel that sacred land contains plants, herbs, and waters possessing healing powers, and at certain sites people communicate with the spirit world through prayers and offerings. Native people acknowledge that they live on and use sacred land, but they feel they are obligated to perform ceremonial or ritual duties in order to honor the land and all it provides. Many Native American Indian people recognize a natural contract between themselves and other animals and fish, birds, and plants. Use of these resources usually requires honoring and thanksgiving. It is important to understand that many Native Americans have these views that are very different from mainstream world views and that what happens to land and resources matters a great deal to Native Americans.[22]

D. Language

> There are many Indian words which when translated into English, lose their force, and do not convey so much meaning in one sentence as the original does in one word. It would require an almost infinitude of English words to describe a thunder storm, and after all you would have but a feeble idea of it. In the Ojibway language, we say "*Be-Wah-sam-moog*." In this we convey a continued glare of lightning, noise, confusion— an awful whirl of clouds, and much more.[23]

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21 Columbia River Inter-Tribal Fish Commission, A Tribal Tradition of Sound Fisheries Management, Wy-Kan-Ush-Mi Wa-Kish-Wit, Spirit of the Salmon: The Columbia River Anadromous Fish Restoration Plan of the Nez Perce, Umatilla, Warm Springs and Yakama Tribes, Volume I, 2-4 (1995).

22 Hirschfelder, *supra* note 16, at 27.

23 Kah-Ge-Ga-Gah-Bowh, or George Copway (*Ojibway*), Indian Life and Indian History by an Indian Author - Embracing the Traditions of the North American Indians Regarding Themselves Particularly of that Most Important of all the Tribes - The Ojibways. (1858).

Native Americans do not speak "Indian." Estimates vary as to the total number of American Indian languages in North America north of Mexico at the time of first contact, but it is generally held that there were between 500 and 600 mutually unintelligible languages belonging to more than 10 language families. Some of the languages that still exist are related. For example, the languages spoken by Navajos and Apaches are Athabascan languages. They often can understand one another. However, Tlingits in Alaska who speak an Athabascan language cannot understand Navajos or Apaches. Some of the languages are completely different. For example, Hopis in Arizona cannot understand any of the Siouan languages just like Spanish speakers cannot understand Tibetan. Traditionally, native languages were passed orally from generation to generation. The systems are complex and have precise grammars and vocabularies with thousands of words. Some of the languages were written down by missionaries and others. But mostly, Native Americans were forbidden to speak their languages, particularly in the various compulsory boarding schools that were set up to educate Indians in the late 1800s and early 1900s. Nevertheless, many languages are still spoken. To the extent they can, tribes are putting resources into reviving languages. Speaking one's language is held in high esteem by Native Americans. It is one of the most important ways that Native Americans express their identity and ensure the life of their unique cultures. For some tribes, traditional knowledge can only be fully understood in the language because there is not an easy way to translate it into English. Sometimes, religion cannot be practiced without the language. Oratory is still a great tradition among Native Americans.[24]

E. Education

> We Inupiat believe that a child starts becoming a person at a young age, even while he or she is still a baby. When a baby displays characteristics of individual behavior, such as a calm demeanor or a tendency to temper tantrums, we say 'He or she is becoming a person.' In our culture, such characteristics are recognized and accommodated from early childhood. As each child shows a proclivity toward a certain activity, it is quickly acknowledged and nurtured. As these children and adults in the community interact, bonds are established that help determine the teacher and the activities which will be made available to that particular child. As education progresses, excellence is pursued naturally.[25]

Traditionally, Native Americans were educated by their families, especially by grandparents, elders, and religious and social groups whose job it was to teach world views, values, attitudes, beliefs, rules, roles, and skills. Children were exposed to kinship roles, life cycle rituals, religious ceremonial events, storytelling, and hands-on instruction. Tribal educators taught history, what would now be called earth or physical sciences, physical education, codes of social behavior, religious training, health care, and many other subjects. All of this changed over time. Boarding schools with non-Indian teachers became widespread. Boarding schools had a major influence on Native American life. Today, children go to off-

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[24] Hirschfelder, *supra* note 16, at 61.

[25] Okakok, Leona (*Inupiat*), "Serving the Purpose of Education." *Harvard Educational Review*, 59, no. 4, 405-422 (November 1989).

reservation public and private schools. Tribal community education continues in many respects, and children are still taught much of what used to be taught.[26]

F. Traditional Story Telling

> Every evening we would ask Dad and Uncle to tell Coyote stories, but they would refuse. . . . Because telling Coyote stories could cause the weather to change drastically. . . . When the temperature hit forty degrees below zero, they decided it couldn't get any colder. "Forty below," they said. . . "That's it." Coyote stories tonight.
>
> Coyote is an outrageous character that all Indian tribes of the West told stories about. . . . He had no scruples, none at all. He would tell his kids, "Look at that!" and while their heads were turned, he would steal food from their plates. He lied and swindled and took advantage of everyone. . . .
>
> Sometimes the stories were hilarious. Sometimes he got his just desserts. Like the time he believed the sun's job was easy and he got the sun to trade places for a day. As Coyote (now the sun) moved across the sky high above the earth, he looked down and saw all kinds of goings-on. He knew everyone's secrets and, being the sort of person he was, he was not about to keep his mouth shut. He ridiculed them and laughed at them and told all their secrets. But he did himself in because he saw himself and revealed his own embarrassing secrets and the next day he had to take his own place again and live with being the butt of everyone's jokes for a very long time.[27]

Histories, cultural traditions, and laws have been passed on by storytelling. The stories explain how the people first came into being, how the sun, moon, stars, rainbows, sunsets, sky, thunder, lakes, mountains, and other natural occurrences came about. Tribal stories explain the origin of landmarks, plants, and animals. Some stories tell about greed, selfishness, or boastfulness. The stories often give practical advice such as how to hunt or fish and some include recipes for ways to heal, or describe how to find the right root or herb. They teach laws and the consequences for violating them. Some stories are so sacred and powerful that they are treated with special respect: creation stories are often recited in a ritual way and told in a serious manner. Stories are often told only at special times of the year such as in the winter. They've been passed on for hundreds of years and possibly much longer.[28]

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26 Hirschfelder, *supra* note 16, at 91.

27 Janet Campbell Hall (*Couer d'Alene*), Bloodlines: Odyssey of a Native Daughter (1993).

28 Hirschfelder, *supra* note 16, at 133.

G. Traditions

> Every white man seemed to have a great concern about time. We had our own names for the seasons and for the months that made up the year, but they were not the same as those the white man used. And we did not know how he counted time, by minutes and hours and days of the week, or why he divided the day into such small parts. And we found that there were two ways of counting it, for the Quakers spoke of First-day, Second-day. . . while others spoke of Sunday and Monday and Tuesday. . . . It was a long time before we knew what the figures on the face of a clock meant, or why people looked at them before they ate their meals or started off to church. We had to learn that clocks had something to do with the hours and minutes that white people mentioned so often. They were such small divisions of time that we had never thought of them. When the sun rose, when it was high in the sky, and when it set were all the divisions of the day that we had ever found necessary when we followed the old Arapaho road. When we went on a hunting trip or to a sun dance, we counted time by sleeps.
>
> White people who did not try so hard to understand the ways of Cheyenne and the Arapaho as we did to understand their ways, thought we were all lazy. That was because we took a different attitude toward time from theirs. We enjoyed time; they measured it. . . we were not an idle nation of people. If we had been idlers, we would have been wiped out by our enemies or by bad weather and starvation long ago. . . . No people who get their living from Mother Earth as she provides for them, and who fight off other tribes wanting to hunt and graze their horses over the same land, can be lazy.[29]

Among the several hundred separate native cultures, there is a pluralism of world views and life ways, probably unimaginable to those who still believe there are generic Indians belonging to generic tribes living in a generic place and time. The preconception of the generic Indian has overshadowed the reality of the social and political organizations, clothing styles, shelters and art forms, musical traditions, economic systems, languages, education, spiritual and philosophical beliefs, and adaptive mechanisms of countless native peoples.[30]

H. Worship

> By today's standards the task of weaving a basket must seem silly to some, compared to deep space exploration or the transmittal of data concerning the origin of the universe. After all, a basket consists of woven sticks, plaited together into containers. Some of us put our dirty clothes into a basket, but for the most part, basketry has fallen into disuse if not obsolescence. It seems the time has

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[29] Carl Sweezy (*Arapaho*, born around 1881), The Arapaho Way: A Memoir of an Indian Boyhood. (ed. Althea Bass), (1966).

[30] Hirschfelder, *supra* note 16, at 161.

> passed when basketry was marveled at for its utility and perfected design. In northwestern California, however, a uniquely shaped, non-utilitarian basket is still essential to three local Indian tribes for conducting their ceremonies to "fix the world." Without the baskets the Hupa, Karuk, and Yurok would not be able to perform the highly important Jump Dance without solving extremely difficult spiritual problems and taking drastic measures. . . . Within our traditional culture and psyche, the baskets are like jewels.[31]

There are many, many religious traditions that have endured among Native Americans despite a long history of suppression by early missionaries and the federal government. These traditions are as dignified, profound, and richly faceted as those of other faiths practiced throughout the world. Many tribes perform ceremonies according to instructions given in sacred stories. Some of the most important ceremonies need to be conducted at certain places at specific times of the year. Some ceremonies mark important life-cycle events in a person's life and take place at important times such as solstices and equinoxes. There are ceremonies to heal the sick, renew relationships with spiritual beings, initiate people into religious societies, ensure success in hunting and growing crops, pray for rain, and to give thanks for harvests of food. Some ceremonies must be performed in order to ensure survival of the Earth and all forms of life. Today, as in the past, Native people also worship by dancing, singing, chanting, and sometimes simply by engaging in reverent actions such as drinking water, burning sweet grass, pinching pieces of food before a meal and putting the pieces in a "spirit bowl," taking a sweat bath, or fasting.[32]

I. Discrimination

> Let it be heard here we are not people of a romantic past or irrelevant present. We intend to live until the end of time. Indians are different people; different, not wrong; different, not opposing; different, not inferior; different, not anomalous. We are not culturally deprived, disadvantaged, or underachievers. We do not take this in an ideological vacuum. . . . Tribalism is no hindrance to us but support. We have a basic confidence about our affairs that has been developed over thousands of years. It takes imagination and cohesion to survive the way we did for the past hundred years or so.[33]

Another perspective:

> Images of noble savages, warriors, braves, and Indian princesses are non-Indians' perceptions of what is Indian, created by authors and writers, and encouraged by the white

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31 Julian Lang (*Karuk*). "The Basket and World Renewal," Parabola: The Magazine of Myth and Tradition, 16, no 3, 83-85 (August 1991).

32 Hirschfelder, *supra* note 16, at 201.

33 U.S. Congress. Senate Special Subcommittee On Indian Education, William Penseno (*Ponca*), Testimony before the Senate Special Subcommittee on Indian Education, Indian Education, part 1, 91st Cong., 1st Sess. (1969).

> establishment. These manufactured images are used to sell everything from butter to cars, and are powerful in their impact on non-Indian people. But this is not the American Indians' perception of themselves.[34]

Unauthentic, unrealistic, and offensive images of Indians in films, outdated textbooks, and other forms of communication are presented everyday. In spite of efforts to correct stereotypes, the distorted imagery and information about native cultures still exists. Stereotypes and misinformation deny the dignity and dynamism of native cultural practices and the distinctiveness of Native Americans' many traditions.[35]

V. TRIBAL COMMUNITIES

A. Native Americans as Tribal Members

Native Americans as individuals are citizens of the United States, citizens of the State they reside in, and they may also be citizens or "members" of their tribes. As federal citizens, a tribal member is not exempt from paying federal income taxes unless there is a special exemption by treaty or other law.[36] As a State citizen, a tribal member must generally pay State taxes if he or she resides or works within a State's jurisdiction unless exempted by treaty or other law.[37]

Membership in a tribe is determined by tribal law. Each tribe has its own law and methods of determining membership but typically membership eligibility is based upon a certain percentage of blood quantum and/or descendancy. Some tribes have additional criteria, such as requiring matrilineal or patrilineal descendancy.

Individual Native Americans who are enrolled members of federally-recognized tribes may be entitled to certain rights and benefits under tribal law or federal laws based partly in treaties, executive orders, and federal legislation because of their status as members.[38] An example of a benefit extended to members is the opportunity to receive Indian preference in hiring by a government or the Bureau of Indian Affairs. Providing the preference is considered a means for increasing and improving Native American participation

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[34] Charlene Teters (*Spokane*), Artist and mother in a statement from her 1994 art exhibition, "What We know About Indians." Recounted in Hirschfelder, *supra* note 16, at 252.

[35] Hirschfelder, *supra* note 16, at 237.

[36] Squire v. Capoeman, 351 U.S. 1 (1956); U.S. v. Anderson, 625 F.2d 910, 913, cert. denied. 450 U.S. 920 (1980).

[37] Reed, *supra* note 7, at 47.

[38] Reed, *supra* note 7, at 3.
Also, AILTP, *supra* note 5, at 34.

in the administration of affairs affecting tribal life. [39] This preference is not based on race, but on a tribal members' unique status with the federal government.

B. Reservations

Reservations were first created by 17th century English colonizers and imposed on tribal communities to remove them from the path of European settlement. The United States took up the practice using military might and other means and created hundreds of reservations that were established by treaty, executive order, or congressional decree. Although these are grim origins, tribal communities have adapted to reservation environments to the extent that many now consider these areas their homelands.[40] An important concept to keep in mind with respect to reservations is the *reserved rights doctrine*. Tribal rights, including rights to land and to self-government, generally were not granted to a tribe by the United States. Rather, under the doctrine, tribes retained ("reserved") such rights as part of their status as prior and continuing sovereign governments.[41]

Before Europeans arrived, Indians occupied all of what became the United States. They practiced self-governance and lived according to their own customs and practices. The English immigrants who began to arrive on the continent in the 17th century lacked the strength to dislodge or subjugate the more powerful Indian nations. As a consequence, the newcomers established borders between themselves and the Indians. They clearly delineated what was "Indian country" and what was British territory. In each area, the respective communities maintained their own laws, customs, and institutions. Later, several imported diseases, military technology and other factors shifted the balance of power in favor of the immigrants. As the immigrants pushed inland, they confined the remnant native groups onto small reservations and settlements.[42]

The practice was continued after the founding of the United States. Treaties established borders between "Indian country" and the new nation. The borders were frequently moved forcing many communities west of the Mississippi. Although these communities were offered new homelands and permanent borders in what became states like Iowa, Missouri, Arkansas, and Oklahoma, the lands were nevertheless opened and more extensive removal took place to the "Indian Territory." Later, many tribes in the west were also removed there especially after deadly military campaigns. Western reservations were established as a result of a continuous pattern of white expansion, military intervention, and then removal.[43]

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[39] AILTP, *supra* note 5, at 25.

[40] Frederick E. Hoxie, editor, "James Riding In" *(Pawnee)*, Encyclopedia of the North American Indians, 546-549, (1996).

[41] AILTP, *supra* note 5, at 6.

[42] Hoxie, *supra* note 40, at 546-549.

[43] *Id.* at 546-549.

Reservation life was extremely restricted by new federal overseers known as the Bureau of Indian Affairs. Movement off the reservation was disallowed, religious practices and movements were quashed and children were often required to go to distant boarding schools to learn how to be like non-Indians. Federal criminal justice systems were established with the intent to supplant traditional dispute resolution processes and the administration of justice. Missionaries were encouraged to operate on reservations with funding support from the government.[44]

In the last decades of the 19th century, the government began dividing up reservation lands into individual homesteads through various laws such as the General Allotment Act and the Curtis Act. Many communities lost a great deal of their lands. After allotments to Indian families were completed, the remaining land was considered surplus and sold or given to non-Indians. Because many Indians were poor, many of them sold the allotments they owned. Many became landless. Reservation land holdings shrank from 138 million acres in 1887 to 48 million acres in 1934. Allotment seriously undermined the tribal governing authority often referred to as "sovereignty." The federal government began working with individuals rather than governments, which allowed outsiders to assume control over many functions provided by traditional leaders. Many Indians were encouraged to move away from their tribes to isolated allotments. Many areas around traditional communities became mixed environments plagued by discrimination and antagonism. Facing bleak futures, many Indians began migrating to other areas in search of work and other opportunities.[45]

Tribes began to formally reassert their authority over their lands and members in earnest after Congress passed the Indian Reorganization Act (IRA) in 1934. The law discontinued the allotment policy, encouraged the formation of governments based on a BIA model, and provided funds for economic development. Lands lost during the Allotment Era were allowed to be re-purchased. IRA did not do much to resolve serious problems such as poverty, deprivation, poor housing and poor health.[46]

New efforts to eliminate Indian tribes began in the 1950s. There were particularly intense efforts to "terminate" the federal-tribal relationship through federal law. Many non-Indians believed that Indian people needed to be free from federal protection, and needed to assimilate into the mainstream society. Some non-Indians seemed to want some of the valuable properties held in trust by the federal government for the tribes' use. The termination policies and laws extended state criminal and civil law to some areas of Indian country. Tribal people lost the power to police their own communities. Particularly affected were communities and reservations in Minnesota, Nebraska, California, Oregon, and Wisconsin. Termination was disastrous. It disenfranchised many Native Americans who under termination law were no longer "Indians" for purposes of health, education, and other federally-funded programs available to provide assistance to Indians. Again, millions more acres of land were lost.[47]

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44 *Id.*

45 *Id.*

46 *Id.*

47 *Id.*

Today, Indian lands, whether called reservations, rancherias, communities, pueblos, villages etc., constitute less than 2 percent of their original area. These lands vary widely in size and demographic composition. In 1990, the federal government recognized 278 Indian land areas as reservations. The Navajo Reservation consists of some 16 million acres in Arizona, New Mexico, and Utah. Some land bases contain less than a hundred acres. About 50 percent of all Native Americans lived on or near reservations in 1990. About half of the land on contemporary reservations belongs to tribes. Significant portions are owned and inhabited by non-Indians. The Indian-owned land is usually held "in trust" by the federal government, meaning that the property is exempt from state and county taxes and can be sold only in accordance with federal regulations.[48]

1. The Special Circumstances of Alaska and Oklahoma

Alaska: Native Americans indigenous to Alaska include Indians, Eskimos and Aleuts. Most still live in small villages throughout the State. In 1741 Russians made contact with these communities. In 1867, the Russian claim to lands in Alaska was sold to the United States. Alaska became a State in 1959. Only a few reservations were ever established in Alaska. The only remaining one is the Annette Island Reserve in the southern panhandle. Instead, there are over 200 village corporations and 13 regional for-profit corporations. This system was established in 1971 by the Alaska Native Claims Settlement Act. The village corporations own land around the villages that are held for the benefit of the village Native people. Regional corporations also own land. Within villages, there are also traditional village councils, some formed pursuant to the Indian Reorganization Act. The village corporations and the village councils may both function as official representatives of the village (no corporations are recognized as governments by BIA). Many villages are also municipalities under Alaska State law. Because village governments are still federally-recognized as tribes by the United States, the village community may be eligible to receive Indian Health or Bureau of Indian Affairs services. In addition, there are also 12 non-profit organizations that are the descendants of the largely tribal groups formed to press for land rights in the 1960s, and which were also the ancestors of the regional corporations.[49]

Oklahoma: All of the land west of the Appalachians was called "Indian Territory" at one time or another. The admission of the states to the Union shrank the area until it approximated present-day Oklahoma, which it became in 1907.[50] The Indian Territory was set aside for the relocation of Indians, particularly those from east of the Mississippi River. Removals were effected by numerous treaties and congressional acts from 1830's to 1870's. Generally, the eastern part of the territory was assigned to the Cherokee, Chickasaw, Choctaw, Creek, and Seminole tribes (the"Five Civilized Tribes"). Small parcels in the extreme northeast were set aside later for other tribes. The western part of the territory became known as "Oklahoma Territory." Here, many other tribes were relocated and were also subject to the General Allotment Act.

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48 *Id.*

49 Tiller, *supra* note 3, 3-4.

50 Felix Cohen, Handbook of Federal Indian Law 772-74 (1982 ed.).

From 1830 until later in that century, all lands set aside by the United States to the various tribes were set aside for member use in common. In the late 1800s, United States policy shifted toward dismantling governments and much of the land was conveyed to individual Indians. These individual conveyances proceeded in three basic ways. The lands of the Five Civilized Tribes were conveyed to individuals with alienation restrictions. Osage lands were conveyed to individuals with the mineral rights reserved to the Osage Tribe for the members. The other conveyances went to the United States in trust for individual allottees. Most Indian land was not allotted to Indians and instead, was made available to the general public.

The result today is that there are many types of land ownership associated with Oklahoma tribes. Tribal trust land is held by the United States with the beneficial interest owned by the tribe. Individual trust lands are also held by the United States, but individuals are the beneficiaries. There are assignable lands owned by the United States, controlled by the Department of the Interior, and assigned, for use, to a specific tribe. Restricted land can be tribally-owned or individually-owned and be allotted. In the case of the Five Civilized Tribes, restricted land must remain in possession of an heir with a certain blood quantum in order to maintain restricted status. Finally, there are fee lands that are privately owned by Indians and non-Indians that are not restricted.[51]

C. Governments

Many Native Americans are enrolled members of tribes. Tribes have governments that take many different forms. Tribal governments exist off reservations as well as on reservations. In fact there are more than 30 tribal governments in Oklahoma but considerably fewer "reservations." Some tribes such as the Shoshone and the Arapaho in Wyoming share a reservation but have separate tribal governments. There are also "confederations" of tribes who govern together on one reservation.[52]

There are also tribal communities that have governments, but are not federally-recognized tribes. That is, they do not have a "government-to-government" relationship with the federal government. When federal recognition exists, the result is a trust responsibility flowing from the federal government, to the tribe as a beneficiary. Some of the tribal communities have never been federally-recognized, and some had recognition but were terminated. There are administrative procedures for gaining federal recognition. Congress can also establish this status, which it has done on many occasions.[53] A number of states such as Virginia have recognized tribes that reside within the boundaries of the state. This recognition does not convey any legal rights under federal Indian law. The state recognition often carries with it some rights such as the right to exclusively occupy and use certain lands and provide some level of local governance. Although these tribal communities may not be eligible for federal assistance based on tribal status, they may be eligible for various programs as minority communities.

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[51] David Hunt, Indian Land Titles II: Beyond the Five Civilized Tribes, 1-4, Presented to the Oklahoma City Real Property Lawyers Association (April 11, 1997).

[52] Reed, *supra* note 7 at 3.

[53] AILTP, *supra* note 6, at 26.

Tribal governments are complex systems and vary from tribe to tribe. Tribes possess all of the powers of governance of sovereign nations except those withdrawn by treaty or by congress.[54] The Supreme Court has said that tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territory."[55] Like other governments, tribes make and enforce laws and adjudicate cases, though not necessarily through separate branches of government. They often offer an array of service programs for tribal members and administer a variety of agencies, including environmental departments. They manage police forces, school systems, and housing programs. Some limitations placed on tribal governance are discussed in Chapter Two.

1. Unique Aspects of Tribal Governance

Tribal governments operate under very stressful circumstances. They have a special responsibility to their citizens. The tribe has to relate to the reservation economy both as a government and as a participant because it is typically also a major landowner and business owner within its own jurisdiction. The tribal governments generally do not preside over healthy economies, which limits their revenue sources. As landowners, they have often turned to development leases, tribally-owned enterprises and joint ventures. The tribal government constituency is predominantly poor and often expects tribal enterprises to favor job creation over profit which complicates tribal participation in business. Tribes experience constant anxiety that economic success will be used as an excuse to terminate the federal recognition of tribal government powers as it was in the Termination Era. There is increasing concern that the complex non-Indian economy may destroy Indian culture and create a rationale for non-tribal political incursions.[56]

The tribal government constituency has unique characteristics as well. Unlike state citizenship, which is generally co-extensive with residency, tribal citizenship often is not. Once an individual is admitted, he or she normally does not lose citizenship. Depending on the tribe, it is possible for an individual to become a member and never be on the reservation at all. Nonresidents can often vote on important tribal matters, even when they have never lived on the reservation. Therefore, nonresident tribal members can sometimes greatly influence policies concerning the local tribal community. Other tribal government constituents include nonmembers and nonvoting Indians whom the government may not be able to govern fully. These constituents can affect public attitudes toward tribal government and tribal rights. State and sometimes municipal governments also represent the tribes' constituents. These governments may also extend services to the reservation community. These circumstances often result in bitter intergovernmental conflict over who owns the revenues that can be generated and who can control or regulate particular interests.[57]

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[54] United States v. Wheeler, 435 U.S. 313, 323 (1978).

[55] United States v. Mazurie, 419 U.S. 544,557 (1975).

[56] Commission on State-Tribal Relations, American Indian Law Center, Inc., Handbook on State-Tribal Relations, 30 (1984).

[57] *Id.* at 33.

Thirty-six percent of tribal residents live in poverty. Most governments balance their responsibilities to the poor against their responsibilities to other economic groups. With their endemic economic imbalance, tribal governments have a different kind of balancing problem and because of the lack of economic diversity, they also have fewer tools to work with and options from which to choose.[58]

The federal-tribal relationship creates other problems for tribal governments. Unlike the federal-state structure, there are fewer well-defined limitations on authority and fewer concrete dispute resolution principles and processes in the federal-tribal relationship. The tribal governments are subject to a continuous shifting of balance between federal control and tribal self-determination (e.g., assimilation, reorganization, self-determination, policy shifts). Political views often change as administrations change and have been unevenly applied over time.[59]

Tribal governments have a unique relationship to tribal culture. Non-Indian governments are developed philosophically and structurally from the majority society. Many tribal government structures are also based on majority society's norms. Tribal governments often get criticized both because they are too influenced by non-Indian ideas of government, and for having systems that are too Indian (for example, some tribes do not distinguish between church and state). At the same time, however, because of historic suppression, tribes have not developed "traditional" or tribal cultural models of government to meet modern challenges. Many governance traditions have been lost and educational advancement has been stifled. Will tribal governments develop the appropriate models that will work for them in this time and under modern circumstances? That is a major question for tribal governments.

Tribal governments are also required to be protectors of Indian culture by their members. Indian culture is perceived to be threatened constantly. Therefore, tribal governments tend to believe that every major policy decision and every significant direction change can lead to irreversible damage. Tribal culture is precariously positioned because it has no ties to another place or society that can renew it. Tribal culture did not stem from Europe, Africa, or Asia. Renewal can only come from within the tribal heartland. This special relationship of tribal government to culture dominates every facet of tribal action. It inculcates a certain caution and conservatism.[60]

2. *Intergovernmental Relations*

Somehow, the federal government and state governments must find ways to accommodate tribal community issues. Whether strengthening tribal-federal or tribal-state relations will threaten tribal culture and institutions is debatable. However, it is not a frivolous question. Tribes must judge for themselves, but it is important that all involved or potentially involved evaluate the issue on its merits. In the case of tribal-federal agreements or tribal-state agreements, it is possible that intergovernmental cooperation can strengthen tribal culture by ensuring tribal control over an area that might be otherwise dominated by

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58 *Id.* at 33.

59 *Id.* at 34

60 *Id.* at 35.

another government. Just as easily, there can be agreements that fail to protect essential tribal interests. The difference between the two lies not in the fact of joint governmental actions, but rather the difference lies in the nature of the agreement.[61] Intergovernmental agreements can be an important environmental management tool. Because they are not permanent devices, they do not necessarily alter any entity's position in perpetuity. Content, however, is an important consideration. Intergovernmental agreements are discussed in more detail in Chapter Three.

VI. SELECTED NATIONAL/REGIONAL INDIAN ORGANIZATIONS

It is very important and required by the EPA Indian Policy that EPA work with tribes on a government-to-government basis. But because there are so many tribes, it is often helpful to work through intertribal networks such as intertribal consortia, tribally-controlled organizations, and grassroots organizations formed around various topics throughout Indian country. Tribal and grassroots organizations can also be valuable in obtaining comment and feedback on agency actions. Tribes may also want to use their intertribal mechanisms to facilitate the development of tribal environmental program. However, it is important to know that a tribe truly desires this. Many tribes do feel that intertribal mechanisms are the best means for maximizing financial and other resources to address environmental priorities. It is equally important that working with intertribal organizations not be used as a substitute for direct tribal consultation and communication. More than 150 tribal organizations exist throughout the country that address environmental and natural resource issues. Below is an illustrative selection of some of these national organizations. For information and contacts for additional organizations, please contact the American Indian Environmental Office at (202) 260-7939 or visit the web site at *http://www.epa.gov/indian.*

National Congress of American Indians: The National Congress of American Indians (NCAI), founded in 1944, is the oldest, largest, and most representative national Indian organization, serving more than three quarters of the American Indian and Alaska Native population. NCAI is organized as a representative congress of consensus on national priority issues. NCAI issues and activities include protection of Indian cultural resources and religious freedom, promotion of Indian economic opportunity, and support of environmental protection and natural resources. Over the past few years, NCAI has passed numerous resolutions supporting various environmental issues. For more information, visit the web site at http://www.ncai.org or call (202) 466-7767.

All Indian Pueblo Council: All Indian Pueblo Council (AIPC) was created more than 400 years ago and is currently an intertribal consortia whose members include all 19 federally-recognized pueblos in New Mexico. AIPC, through its Pueblo Office of Environment Protection, provides technical assistance, training, and support for the environment programs of its member pueblos. For more information, call (505) 881-1992.

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[61] *Id.* at 37.

Inter-Tribal Environmental Council of Oklahoma: Inter-Tribal Environmental Council of Oklahoma (ITEC) was formed in October 1992 by the signing of a Memorandum of Understanding between 20 Oklahoma tribes and EPA Region 6. Since that time other tribes have joined and the current membership is 31 of the 37 federally-recognized tribes in Oklahoma. ITEC provides environmental management for air, land, and water resources to the member tribes. The Cherokee Nation serves as the sponsor tribe, and the elected leader of the Cherokee Nation serves as the Chairman of ITEC.) For more information, visit the web site at *http://207.2.194.130/itec/* or call (918) 458-5498.

Mni Sose Inter-Tribal Water Rights Coalition: Mni Sose, is based in Rapid City, South Dakota, is composed of 27 member tribes in the Missouri River Basin (20 in Region 8 and seven in Region 7). Mni Sose was formally organized and recognized by the Missouri River Basin Indian Tribes in January of 1993. The Coalition's objectives are to strengthen tribal capabilities necessary to manage, control, and protect tribal water resources and to implement tribal environmental programs. For more information, visit the web site at *http://www.mnisose.org* or call (605) 343-6054.

National Tribal Environmental Council: The National Tribal Environmental Council (NTEC) was formed in 1992 and is a membership organization dedicated to working with and assisting tribes in the protection and preservation of the reservation environment. NTEC is open to membership to federally-recognized Indian tribes and currently has 82 member tribes from the continental United States and Alaska. NTEC services include environmental technical support, newsletters, updates, federal regulatory and legislative summaries, workshops on specific environmental issues, resource clearinghouse and reference library, and intergovernmental cooperation. For more information, call (505) 242-2175.

United South and Eastern Tribes: The United South and Eastern Tribes (USET) is an intertribal organization comprised of 23 federally-recognized tribes. The primary goals and objectives of USET include the promotion of tribal health, safety, welfare, education, economic development, and employment opportunities and the preservation of cultural and natural resources. For more information, visit the web site at http://www.one-web.org/oneida/uset/uset.html.

Inter-Tribal Council of Arizona: The Inter-Tribal Council of Arizona was formed in 1953. In 1975 it established the Inter-Tribal Council of Arizona, Inc. (ITCA) to provide a united effort to promote Indian self-reliance through public policy development. ITCA provides an independent capacity to obtain, analyze, and disseminate information vital to Indian community development. The 19 member tribes of ITCA are the highest elected tribal officials, tribal chairpersons, presidents, and governors. ITCA staff of approximately 45 currently implement programs fulfilling goals of ensuring self- determination for tribes in Arizona. For more information visit the web site at *http://www.primenet.com/~itca/* or call (602) 248-0071.

Northwest Indian Fisheries Commission: The Tribes of the Puget Sound established the Northwest Indian Fisheries Commission in 1974 to help them manage their fisheries and to provide member tribes a single, unified voice on fishery-related issues. The Commission employs about 50 people full time in providing informational and educational services, fishery management, planning and enhancement support, environmental coordination, and quantitative and technical services. For more information, visit the web site at *http://mako.nwifc.wa.gov* or call (360) 438-1180.

Columbia River Inter-Tribal Fish Commission: The Columbia River Intertribal Fish Commission (CRITFC) was created in 1977 to coordinate the management and protection of the tribes' treaty fishery resource and to implement the tribes' fishery policies and objectives in the Columbia Basin. The governing body of CRITFC, the Commission, consists of the Fish and Wildlife Committees of Warm Springs, Yakama, Umatilla and Nez Perce Tribes located in Oregon, Washington, and Idaho. The CRITFC staff consists primarily of biologists, attorneys, and other professionals who provide legal and technical assistance to the tribes on issues relating to protection, enhancement, and sustainable use of the fishery resources in the Columbia River Basin. For more information, visit the web site at *http://www.critfc.org* or call (503) 238-0667.

Great Lakes Indian Fish and Wildlife Commission: The Great Lakes Indian Fish and Wildlife Commission (GLIFWC) provides technical assistance to its 11 member tribes in the conservation and management of fish, wildlife, and other natural resources throughout the Great Lakes region, thereby ensuring access to traditional pursuits of the Chippewa people. During 1995, GLIFWC employed approximately 70 full-time and 125 part-time or temporary staff. For more information, visit the web site at *http://www.glifwcis@win.bright.net* or call (715) 682-6619.

Wisconsin Tribal Environmental Committee: The Wisconsin Tribal Environmental Committee (WisTEC) is an intertribal consortia consisting of the 11 tribes located within the exterior boundaries of the State of Wisconsin. WisTEC services include the management of an EPA Environmental Justice grant to help its member tribes develop of their environmental capacity through technical assistance and intergovernmental cooperation.

Native American Rights Fund: The Native American Rights Fund (NARF) was formed in 1970 to provide top-quality legal representation to tribes regardless of their ability to pay. Over the last 26 years, NARF has represented more than 180 tribes and its work has included the areas of tribal reservation, protection of tribal natural resources, promotion of human rights, and development of Indian Law. For more information, visit the web site at *http://www.narf.org* or call (303) 447-8760.

Indigenous Environmental Network: The Indigenous Environmental Network (IEN) is governed by a national council of indigenous grassroots organizations and individuals. The services provided by the IEN National Office include a national clearinghouse on environmental issues, a resource and referral network for technical information and fact sheets, national/regional/local education on grassroots organizing, training, and strategy development, annual conference planning and development, and information dissemination on indigenous grassroots environmental groups and tribal government environmental programs. For more information, visit the web site at *http://www.alphacdc.com/ien* or call (218) 751-4967.

American Indian Science and Engineering Society: The American Indian Science and Engineering Society (AISES) is a private, nonprofit organization that nurtures building of community by bridging science and technology with traditional native values. EPA has a partnership with AISES known as Tribal Lands Environmental Science Scholarship Program, through which the Agency provides educational opportunities to Native American students. For more information, visit the web site at *http://www.colorado.edu/AISES* or call (303) 939-0023.

Inter-Tribal Fisheries Assessment Program: The Inter-Tribal Fisheries Assessment Program's mission is to provide biological information and make management recommendations. For more information, visit the web site address at *http://www.northernway.net/~qitfap/qitfap.htm* or call (906) 632-0072.

Inter-Tribal GIS Council: The Inter-Tribal GIS Council provides technical information, digital data integration for Tribal government. For more information, visit the web site at *http://www.mtjeff.com/~wsgis* or call (541) 276-3165.

Inter-Tribal Timber Council: The Inter-Tribal Timber Council advocates the conservation, enhancement and development of tribal timber resources for the benefit of tribal members. For more information, visit the web site at *http://www.teleport.com/~itc1/index.html* or call (503) 282-4296.

Chippewa Ottawa Treaty Fisheries Management Authority: The Chippewa Ottawa Treaty Fisheries Management Authority manages and regulates the 1836 treaty fishery for the Bay Mills Indian Community, Sault Ste. Marie Band of Lake Superior Chippewas and the Grand Traverse Band of Chippewa and Ottawa Indians. For more information, visit the web site at *http://www.northernway.net/~qitfap* or call (906) 632-0043.

Council of Energy Resource Tribes (CERT): CERT promotes the general welfare of member tribes through the protection, conservation, control and prudent management of their oil, coal, natural gas, uranium, and other resources. Activities include giving on-site technical assistance to tribes in energy resource management, conducting programs to enhance tribal planning and management capacities, and sponsoring workshops. For more information, call (303) 297-2378.

Inter-Tribal Agriculture Council: The Inter-Tribal Agriculture Council's mission is to promote Indian natural resources. For more information, call (406) 259-3525.

Inter-Tribal Bison Cooperative: The Inter-Tribal Bison Cooperative (ITBC) provides technical support to tribal bison management operations and helps tribes acquire, care, and develop these animals. The cultural significance of bison to Native Americans is a significant factor in the ITBC's advocacy of tribal management of bison. For more information, visit the web site at *http://www.intertribalbison.org* or call (605) 394-9730.

Native American Fish & Wildlife Society: The Native American Fish & Wildlife Society exists for the protection, preservation, and enhancement of fish & wildlife resources. The Society's purposes are charitable, educational, scientific, and cultural. For more information, visit the web site at *http://www.iex.net/nafws* (soon the site will be *http://www.nafws.org*) or call (303) 466-1725.

CHAPTER TWO: FEDERAL INDIAN LAW

I. INTRODUCTION

A. What Is Federal Indian Law?

The term "federal Indian law" refers to the body of law that defines the legal relationship between the United States and the Indian tribes.[62] As the name implies, it does not generally include either state law or the laws that tribes have developed to govern themselves, their members, and their territory. Federal Indian law originated in the dealings between the European colonial powers and the native nations of the Americas. The framers of the Constitution affirmed this relationship by delegating the power to regulate relations with Indian tribes to the Federal Congress. From two lines in the Constitution, federal Indian law has grown to encompass about 380 treaties, separate volumes of both the U.S. Code and Code of Federal Regulations, and thousands of court decisions. It continues to grow today as tribes increasingly take an active role in areas of government denied them in the past.

Originally, Indian nations were not considered part of the United States. Article I of the Constitution, for example, disallows counting "Indians not taxed" toward apportionment of the House of Representatives. Since then the relationships between the United States, the tribes, and the states have continuously evolved. As the tribes became more integrated into the United States, they lost or gave up several attributes of sovereignty, and their people became U.S. citizens—both taxed and apportioned representation in Congress. Today, Indian nations form an integral part of the national system, while retaining most of the attributes of their original status as self-governing sovereign nations.

That status as sovereign nations within the United States gives tribal governments a role unlike that of the other two types of U.S. sovereigns—the federal government and the states. Tribes may regulate a wider range of subjects than the federal government, but do not have the same extensive powers as the states. On the other hand, tribes, not having signed the Constitution, are not bound by its restrictions, unlike the federal government and state governments. Tribes are, however, subject to the supremacy of federal law.

B. Definition of Tribe, Indian and Indian Country

One of the most fundamental assumptions of Indian law is that the basic relationship between the United States and a tribe is one between the two nations through their respective governments. Federal Indian law primarily concerns tribal sovereignty, individual and tribal property rights, and the division of jurisdiction between the tribes and states; "Literally every piece of legislation dealing with Indian tribes . . . single[s] out for special treatment a constituency of tribal Indians . . . "[63] To be found constitutional, however, "Federal racial classifications . . . must serve a compelling government interest, and must be narrowly

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62 Including federally-recognized Alaska Native entities.

63 Morton v. Mancari, 417 U.S. 535, 552 (1974).

tailored to further that interest."[64] The Supreme Court has very rarely found such a compelling justification.

At first glance, federal Indian statutes may appear to violate this prohibition. The Supreme Court has found, however, that the classification of Indians is not suspect so long as the classification depends upon the Indians' membership in a tribe with governmental status, and not upon the perceived racial characteristics of the individuals.[65] Thus, Indian and tribe, both of which are also ethnological terms, have taken on a different significance as legal terms. As such, the classification is political, not racial, because it depends on membership in a tribe. Interestingly, the determinations of what entities are tribes for these purposes are ultimately up to Congress.

Tribe: There is no definitive legal description of what constitutes a tribe that applies to all areas of this field of law. One of the most widely-used descriptions comes from the 1901 Supreme Court case, *Montoya v. United States*: "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory."[66] As far as the federal government is concerned, it only has a government-to-government relationship with those tribes that it has recognized. As a result, the typical definition of "tribe" is functional rather than descriptive: a tribe is an entity that appears on the list of federally-recognized tribes published annually by the Bureau of Indian Affairs (BIA), Department of the Interior (DOI).[67] The federal government has recognized 560 tribes by treaty, statute, executive order, the presence of a long-term historical relationship, or other means.

Since 1978, BIA has used powers delegated by Congress to extend recognition to tribes. The Bureau's regulations require that a tribe seeking recognition has maintained a distinct identity, has exercised political authority over its members through history to the present, has drawn that membership from a historical tribe (but not primarily from the membership of another recognized tribe), and currently has governing procedures and methods of determining membership. In addition, Congress must not have expressly terminated or forbidden a federal relationship with the tribe.[68]

Tribes not on the list of federally-recognized tribes do exist independent of federal acknowledgment, however, as demonstrated by the fact that tribes gain recognition from time to time. This attests to the

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[64] Adarand Constructors v. Pena, 515 U.S. 200, 235 (1995).

[65] E.g., Fisher v. District County Court, 424 U.S. 382, 390 (1976).

[66] 180 U.S. 261, 266.

[67] E.g., Indian Entities Recognized and Eligible to receive Services from the United States Bureau of Indian Affairs, 62 Fed. Reg. 55,270 (1997). The Federally-Recognized Indian Tribe List Act of 1994, which requires publication of this list, defines "[t]he term 'Indian tribe' [to] mean any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe." 25 U.S.C. §479a.

[68] 25 C.F.R. § 83.7 (1997).

origins of tribes separate from the United States even where they have no governmental presence in federal law. However, the distinction is often academic. Many tribes without the protection of federal recognition have collapsed and disappeared because there was no way to assert themselves under state and federal regulation.

Indian: Just as tribes determine for themselves whether and in what form to persevere or cease to exist, they also determine their own membership. The significance of this in federal Indian law is that the definition of Indian also tends to be functional: a member of an Indian tribe. Therefore, the tribes determine who is an Indian. Of course, that means that the definition of Indian tends to incorporate the membership criteria of hundreds of federally-recognized tribes. In addition, the federal government has codified definitions of Indian for various purposes that impose so-called blood quantum requirements or eliminate the tribal membership requirement. It is important to note that Indians also constitute an ethnic minority in the United States protected by the civil rights guarantees of the Constitution and Civil Rights Acts. As such, discrimination for or against Native Americans on the basis of race, color or national origin is as illegal as it is for other ethnic groups.

Indian country: Federal Indian law and tribal laws generally only apply, and state laws generally have no effect, within the area known as Indian country. Historically, Indian country was the area beyond the frontier where Indian nations still held sway. Today, Indian country is that part of the United States set aside for Indian nations. While the legal definitions of tribe and Indian tend toward the circular, in 1948 Congress codified the definition of Indian country:

> "Indian country" . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.[69]

While the statutory definition only purports to define the limits of the applicability of a chapter of the U.S. criminal code, the Supreme Court has held that it also provides a generally appropriate definition of the frontiers of tribal and civil federal Indian law jurisdiction on one hand and state jurisdiction on the other. This is not as incongruous as it seems since Congress based the statutory language on Supreme Court precedents.

II. HISTORY OF FEDERAL INDIAN LAW

The different types of Indian country memorialize the sometimes radical shifts in Indian policy throughout U.S. history. To understand how tribes have managed to retain the territories and powers that they have today, one must look to sometimes quite ancient history.

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[69] 18 U.S.C. § 1151.

A. Pre-contact

Indian tribes have lived in the Americas since time immemorial. Anthropologists may define this as tens of thousands of years ago, but federal Indian law flattens out this immense time span into pre- and post-contact eras. Events in the Americas before European exploration have no legal significance in the field—although they may in tribal law. It should come as no surprise given tribal longevity that tribes now within the United States have had formal, government-to-government relations with a variety of European powers, their colonies, the original states, and finally with the United States.

B. European Colonization

Various legal theories on how to acquire Indian land properly prevailed during the period between the first contacts between Europeans and Native Americans and the ratification of the Constitution. These theories differed on such major points as whether the Indian nations held title to the land or if only so-called Christian nations could do so, and whether only the nations could buy and sell those lands, or if individuals could do so.

In 1532, Francisco de Victoria advised the Spanish Emperor that European rights to lands occupied by Indians were not superior to those of the Indians. Therefore, Spain would need the consent of the tribes to take dominion over land in the Americas or else conquer them in a just war. Spain, the Pope, and within 100 years, the other colonial powers adopted Victoria's reasoning as law with some significant variations.[70] Despite doctrinal differences, Europeans generally purchased land from the Indian tribes through treaties negotiated between the political leaders of the colonies and the tribes as representatives of independent nations. That is not to say that the expansion of European settlement was generally fair, peaceful, or lawful.

In order to maintain peace with the Indian tribes and discourage their alliance with France, King George III of England, in the Proclamation of 1763, forbade the encroachment of colonists into the Indian territory west of the Appalachians, implicitly recognizing Indian ownership. This greatly antagonized the colonists, many of whom continued to purchase land directly from the Indians.

Treaty making by the fledgling United States followed the government-to-government pattern set prior to the Revolution, however. The 1778 Treaty with the Delawares, the first between the United States and an Indian tribe, pledged friendship and respect for the separate territory of the two nations.[71] Before the adoption of the Constitution in 1789, the United States and the several states concluded many Indian treaties. They sought primarily to establish peace and territorial boundaries, and to regulate trade and the extradition of criminals, among other subjects.

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[70] Felix Cohen, Handbook of Federal Indian Law 50 (1982 ed.).

[71] Treaty with the Delawares, Sept. 17, 1778, 7 Stat. 13.

C. Foundation of Federal Indian Law and Policy (1789–1871)

The Constitution, ratified in 1789, delegated all power over Indian affairs to the federal government. States negotiated treaties with and purchased land from tribes after that time, but the Constitution made those actions ineffective or illegal. Soon after the assembly of its first session, Congress passed the first Trade and Intercourse Act restricting all dealings with Indians to licensed traders, outlawing the purchase of lands directly from Indians and assigning punishments to crimes committed by colonists against Indians.[72]

1. The Marshall Trilogy: The Bedrock of Federal Indian Law

In 1823, Chief Justice Marshall wrote the first of these cases, *Johnson v. McIntosh*, which addressed competing claims to the same lands acquired from the same Indian tribe by different means.[73] The first claim was based on a purchase by a private consortium, while the second claim was based on a purchase by the United States through a treaty. The Supreme Court held that Indian nations could only convey complete ownership of their lands to the United States, not private individuals. Chief Justice Marshall based his opinion on the United States' adoption of the doctrine of discovery, which held that a title to Indian lands vested in the European power that claimed them.[74] "The absolute ultimate title has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring."[75] Chief Justice Marshall found that the Indian title was compatible with U.S. property law and was defensible against all but the federal government.[76] Since Indian tribes did not have full title, they could not convey it. Only the United States could do so, but it must first extinguish the Indian right of occupancy by purchase or by conquest.[77] The claimants who had bought lands directly from a tribe could have received only the Indian title of occupancy that the treaty later extinguished.[78]

Marshall noted and questioned the justification of this doctrine based as it was on the lesser value placed on Indian cultures by European powers. Marshall opined that it was not up to the "courts of the conqueror," which owed their legitimacy to the doctrine of discovery to question that concept:

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72 Cohen, *supra* note 70, at 110.

73 21 U.S. (8 Wheat.) 543 (1823).

74 *Id.* at 587.

75 *Id.* at 592.

76 *Id.*

77 *Id.* at 587.

78 *Id.* at 592.

> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.[79]

This approach legitimized U.S. expansion at will, legally confirmed ultimate federal control of Indian affairs, and restrained encroachment not authorized by the federal government into Indian territories. Most importantly, it confirmed the necessity of treaty making to a nation that sought to expand, but avoid war with the Indian tribes.

Although the Constitution, several acts of Congress, and the Supreme Court had resolved on paper which government would have responsibility for Indian affairs, they did not end the competition between the federal government and state governments for actual control of Indian affairs. In addition, they did not define the position that Indian tribes held in or out of the new republic. The mounting three-way conflicts diffused for a time when Congress resolved in 1830 to remove the Indian tribes from the borders of the states then in existence to the newly-acquired lands west of the Mississippi—lands occupied by other Indian tribes.

Of the tribal-state strife that motivated the removal policy, the conflict between the thriving Cherokee Nation and the rapidly growing State of Georgia may have been the most acrimonious. In any case, it was the most litigated, yielding the second two cases in the Trilogy. The State of Georgia, in an attempt to oust the Cherokee Nation from its lands in spite of its treaty with the United States, began a campaign of official harassment:

> The acts of the legislature of Georgia seize on the whole Cherokee country, parcel it out among the neighboring counties of the state, extend her code over the whole country, abolish its institutions and its laws, and annihilate its political existence.[80]

In *Cherokee Nation v. Georgia*, the Cherokee Nation challenged the legality of these actions directly in the Supreme Court invoking the Court's original jurisdiction over suits between a state and a foreign state.[81] The Court dismissed the case in 1831, ruling that it lacked jurisdiction to hear the case because "an Indian

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[79] *Id.* at 591.

[80] Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 542 (1832).

[81] 30 U.S. (5 Pet.) 1, 16 (1831). The Court found that Georgia could "unquestionably be sued in this court," *id.*, because it assumed at the time that states were not immune from suit by foreign states. Monaco v. Mississippi, 292 U.S. 313, 330 (1934) (Eleventh Amendment immunity bars suits by foreign states against states without their consent). Generally, tribes and states may sue each other only with a waiver of the defendant government's sovereign immunity. E.g., Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991) (state sovereign immunity to suit by tribe); Oklahoma Tax Comm'n v. Potawatomi Tribe, 498 U.S. 505 (1991) (tribal sovereign immunity to suit by state).

tribe or nation within the United States is not a foreign state in the sense of the constitution."[82] Marshall held that Cherokee had shown that it was indeed a state by virtue of its self-government and its treaty relationship with the United States,[83] but he rejected the argument that the Nation was foreign since it was wholly within the United States.[84] Later cases have generally accepted Marshall's comment that Indian tribes "may, more correctly, perhaps, be denominated domestic dependent nations"[85] as the definition of tribal status in the federal system. Thus, for U.S. law, the independence of Indian tribes since time immemorial finally came to an end, but not their power to govern their territory.

A year later, in 1832, the Supreme Court ruled in a case arising from the enforcement of the same Georgian laws in *Worcester v. Georgia*.[86] Missionaries to the Cherokee Nation appealed their conviction in Georgian courts for not having received a license from the Governor of Georgia to enter Cherokee country. Marshall, tracing the colonial history to which the United States was an heir and relying on principles of international law, held that the relationship between the United States and the Cherokee Nation resembled that of a guardian to its ward, and precluded relations with other colonial powers, but did not divest the tribe of its sovereignty: "the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger and taking its protection."[87] Marshall concluded "[t]he Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described in which the laws of Georgia can have no force."[88] Furthermore, "[t]he whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the Government of the United States."[89] On the basis of the continued exclusive sovereignty of the Cherokee Nation and the delegation of the power to regulate Indian affairs exclusively to the Federal Government "[t]he act of the state of Georgia . . . [was] consequently void."[90]

The Marshall Trilogy stands for the proposition that Indian tribes had lost the ability to transfer their lands or enter treaties with any entity except the United States, but were otherwise unchanged, distinct political entities that could continue to rule their own territories within the United States. Over the next century and

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82 Cherokee Nation, 30 U.S. at 20.

83 *Id.* at 16.

84 *Id.* at 17.

85 *Id.* at 16

86 31 U.S. (6 Pet.) 515 (1832).

87 *Id.* at 560-61.

88 *Id.* at 561.

89 *Id.*

90 *Id.*

a half, the courts and Congress eroded those clear rules, but they remain the starting points for any analysis of the powers of tribes.

2. *Removal*

The federal government never had to force the State of Georgia to comply with *Worcester* because the Governor pardoned the missionaries instead. During the litigation the removal of Indians throughout the east had begun. The 1835 treaty of New Echota purported to cede all Cherokee lands. Most Cherokee rejected the treaty, but in 1838 the United States forced the Cherokee to leave their ancestral lands, homes, and possessions at gunpoint. The Trail of Tears refers to the forced march of nearly the entire 17,000-member Cherokee Nation from northern Georgia to present-day Oklahoma that killed 4,000 Cherokees. The removal policy had reached its height. The United States eliminated nearly all Indians from the fertile eastern United States and placed most in the semiarid center of the country— known at the time as the Great American Desert. Even today, the conspicuous absence of any large Indian populations in the East or many tribal groups in an area that once had a dense Indian population testifies to the chilling results of this immense segregation policy. Despite that, a few remnant tribes do remain to assert their presence in the East. The removal policy gave way in the 1850s to an official policy of confining Indians to reservations rather than attempting to remove them beyond the quickly expanding frontier.

3. *Treaties*

Worcester confirmed that Indian treaties were of the same dignity and weight as other treaties.[91] The Constitution recognizes treaties as the supreme law of the land, on the same level as acts of Congress, which means that they preempt State law, but may be abrogated by a later act of Congress. Today, in many ways, the fight to have the terms of treaties fulfilled forms the centerpiece of the Indian tribes' quest to expand recognition of their rights. Ironically, treaties had the opposite effect when they were made. In making treaties, the United States clearly recognized tribal authority. Typically, however, treaties served as the instrument by which the tribes ceded to the United States portions of their land and other rights. Furthermore,

> The legal force of Indian treaties did not insure their actual enforcement. Some important treaties were negotiated but never ratified by the Senate, or ratified only after a long delay. Treaties were sometimes consummated by methods amounting to bribery, or signed by representatives of only a small part of the signatory tribes. The Federal Government failed to fulfill the terms of many treaties, and was sometimes unable or unwilling to prevent States, or white people, from violating treaty rights of Indians.[92]

Over the course of United States-Indian treaty making, from 1778 to 1871, the United States ratified about 380 treaties. In the 1840s and 1850s, a flurry of treaty making occurred with Indian tribes in the northern plains, the Northwest, the West, Southwest and Texas. These treaties did not generally seek the removal of

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91 *Id.* at 559.

92 *Cohen, supra* note 70 at 63.

tribes from contact with the few states in the area at that time, but rather confined the tribes to smaller reserved territories. Tribes would cede most of their lands, but reserve certain lands and other rights to themselves. These lands and other rights were not necessarily coterminous, which has led to Indian rights to hunt, fish, and gather, among other things, outside of the lands reserved by them. The United States negotiated few treaties between the outbreak of the Civil War and the end of treaty making in 1871.

An 1871 rider on an appropriations bill ended treaty making with Indian tribes. At least part of the reason was because the House, which has primary authority over appropriations, had no say in the negotiation of treaties, but was responsible for dispensing the funds required by them. A practical reason for ending the treaty process was that there was no longer anywhere that Indians could live out of the paths that the United States had chosen for settlement. The rider (as codified) reads:

> No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired.[93]

The effect of the provision was to replace treaties with agreements that the Executive Branch negotiated and both Houses of Congress enacted into law. Acts of Congress, of course, have the same legal effect as treaties. Congress and the Executive Branch continued to set aside land for Indians. Thus, the move was mostly symbolic, heralding the beginning of the assimilation era.

D. Attempted Assimilation (1871–1928)

The focus of federal Indian laws now shifted to the removal of more lands from Indian tribes to the United States for settlement, the expansion of federal laws into internal tribal affairs, the widespread use of mandatory boarding school education far away from home to "take the Indian out of the child," and, above all, the allotment of reserved tribal lands to individual Indian ownership.

1. Allotment

The General Allotment Act (Dawes Act) enabled the President to allot small parcels of tribal lands to individual Indians who selected them, to hold the land in trust for 25 years or longer to prevent the transfer of the land, to sell lands left after allotment to the United States, to subject allottees to State civil and criminal jurisdiction, and to extend U.S. citizenship to allottees. Under the original Act the heads of households and minors received 160 and 40 acres each. An amendment soon changed the amount to 80 acres of farming land or 160 acres of grazing land per Indian. Later amendments made it much easier to alienate these lands before the 25 years were up.

The allotment acts sought to break up tribes by breaking up ownership of the land. The various acts, however, did not purport to eliminate tribal governments. Policy makers generally hoped, however, that

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[93] 25 U.S.C. § 71.

tribes would fade away once individual private property ownership made Indians independent of the tribe, and tribal members learned how to live in the larger society. As Theodore Roosevelt put it, "the General Allotment Act is a mighty pulverizing engine to break up the tribal mass. It acts directly upon the family and individual."[94] Of the 138 million acres in Indian or tribal hands in 1887, only 48 million remained in 1934. Most of the loss was due to the cession to the United States of the 60 million acres of tribal land that Congress declared "surplus"—no longer needed by Indians—after the allotments had been made. Of those, the United States paid for 40 million acres, and the rest were simply opened to homesteading by Congress. That would not have been nearly as traumatic had the allottees been able to hold on to their lands. As a rule they did not. The small size of the allotments often made them economically unsound as farms. Of 35 million acres allotted, 27 million were lost or sold, generally through tax sales or swindles.[95] Despite the massive dispossession caused by allotment, it was the official policy of the United States for nearly 50 years.

2. Case Law at the Turn of the Century

Major Supreme Court Indian jurisprudence at the end of the 19th century swung back and forth between the conceptions of tribes as self-governing sovereigns and mere federal subjects. In 1882, *McBratney v. United States* bucked the *Worcester* rule of exclusion of state law, and found state jurisdiction over the murder of a non-Indian by a non-Indian in Indian country. In 1883, *Ex parte Crow Dog* reversed the federal court conviction of an Indian for the murder of another Indian, finding that federal laws not specifically directed at Indian country could have no effect there. Congress immediately passed the Major Crimes Act, which applied federal law to seven crimes in Indian country. In 1886, *United States v. Kagama* upheld this new federal intrusion into internal tribal self-government. In 1896, *Talton v. Mayes* held that the source of tribal powers predated, and was not modified by, the Constitution. Therefore, the restrictions of the 5th and 14th Amendments did not apply to tribes. In 1903, *Lone Wolf v. Hitchcock* upheld the unilateral sale of lands by the United States in direct contravention of a treaty requirement of the consent of three-fourths of adult males for the sale of tribal land. These cases seem to exemplify the confusion caused by the phrase "domestic dependent nations." *Crow Dog* and *Talton* follow the *Worcester* conception of tribes as internally autonomous, but subject to express, overriding federal authority. On the other hand, *McBratney, Kagama,* and *Lone Wolf* ignore the explanation of dependency found in *Worcester* and instead take it literally to mean complete dependence on the United States for government and support. This conformed completely with the allotment policy, which cast itself as a means to make a helpless people independent.

E. Reorganization (1928–1942)

In 1928, the Meriam Report[96] concluded that the allotment and assimilation policy had failed. This spurred a short period in which the federal government shifted away from a policy that encouraged the political and

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[94] Charles Wilkinson, American Indians Time and the Law 19 (1987).

[95] *Id.* at 19, fn. 65.

[96] A private, two-year study of BIA requested by the Secretary of the Interior. Cohen, *supra* note 70, at 144

social dissolution of tribes to a policy of encouraging tribal government along the lines recommended by the United States, and protecting tribal resources. The centerpiece of this era was the Indian Reorganization Act (IRA). IRA stopped further allotment, extended the federal trust status of allotments indefinitely, authorized return to the tribes of surplus lands and the establishment of new reservations. In addition, IRA offered template governments (based on the federal government) to tribes that would accept federal oversight. Forty percent of tribes rejected the offer. Some tribes found IRA useful in the resuscitation of tribal government, but others found it unadaptable to the tribal context. Most tribal governments are organized under IRA.

F. Termination (1943–1968)

After just 15 years, Congress again began to embrace the dissolution of tribal ties and tribes as U.S. policy. Many continued to believe that it was tribal existence that kept Indians from integrating into mainstream society. Congressional reports issued between 1943 and 1950 were extremely critical of reorganization and of BIA. Funding for BIA was greatly cut during this period. In 1952, the House passed a resolution calling for the formulation of proposals "designed to promote the earliest practicable termination of all federal supervision and control over Indians."[97] A year later, House Concurrent Resolution 108 passed, calling in ringing terms for the end of the special status of Indians, and the termination of federal supervision and control over all tribes in several states and several additional tribes.[98] This resolution was not binding, but it did guide the course of termination policy. Congress terminated the federal relationship with more than 100 tribes in the next few years. Typically, the tribes lost their land, became subject to state authority, and found it impossible to exercise their governmental authority. In tandem with termination of tribes, BIA embarked on a very large relocation program that granted money to Indians to move to selected cities to find work. After cutting BIA's budget for 10 years, Congress had to triple it to keep up with the costs of termination and relocation.

1. Public Law 83-280

Congress also enacted Public Law 83-280 (PL 280) in 1953, delegating limited jurisdiction over Indian country to several states.[99] PL 280 states are divided between six so-called mandatory states named in the Act, and nine optional states that assumed jurisdiction later by simply changing their own laws. No provision of PL 280 required tribal assent to this process, although most of the optional states did seek it. The mandatory states—Alaska (added in 1958), California, Minnesota, Nebraska, Oregon, and Wisconsin—received the full extent of the jurisdiction delegated by the Act.[100] The optional states—Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, Utah, and Washington—

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97 Cohen, *supra* note 70, at 170.

98 *Id.* at 171.

99 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 28 U.S.C. §§ 1360).

100 18 U.S.C. § 1162(a).

assumed all or part of the jurisdiction offered.[101] Consequently, one must look to the state law of the optional states to know what jurisdiction the state assumed.

In PL 280, Congress extended state criminal jurisdiction into Indian country, and repealed the federal criminal laws relevant to Indian country for selected states and Indian country. PL 280 probably did not repeal tribal criminal jurisdiction, but the criminal laws of affected tribes could not conflict with state law.[102]

The Supreme Court ruled that PL 280's grant of civil jurisdiction did not go as far based on differences between the statutory language in the criminal and civil grants of authority, and the presumption that the Court will not imply limitations on tribal authority.[103] In *Bryan*, the Court found that the civil grant did not authorize state civil regulation in Indian country.[104] A later case, *Cabazon*, clarified the distinctions between the civil and criminal sides, establishing the inapplicability of civil/regulatory state laws and the applicability of criminal/prohibitory state laws.[105] Thus, PL 280 would not extend into Indian country state laws regulating pollution discharges, but would extend state laws prohibiting murder.

In addition to these judicial limitations, the statute excepts certain types of jurisdiction from both the civil and criminal grants of jurisdiction. States may not alienate, tax, or otherwise encumber assets held in trust or otherwise restricted by the United States for the benefit of tribes or Indians.[106] In addition, states may not regulate such assets in any way that conflicts with a treaty, statute, or agreement.[107] Most importantly, this prevents states from regulating hunting and fishing rights confirmed by treaty or statute.[108] Furthermore, PL 280 bars the state courts from adjudicating ownership, possession, or other interests in trust property.[109]

G. Self-determination (1968–present)

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101 Pub. L. No. 83-280 § 7, 67 Stat. 588, 590 (1953).

102 William Canby, American Indian Law 180 (2d ed. 1988).

103 Bryan v. Itasca County, 426 U.S. 373 (1976).

104 *Id.* at 388.

105 California v. Cabazon Band of Mission Indians, 480 U.S. 202, 214 (1987).

106 18 U.S.C. § 1162(b); 28 U.S.C. § 1360(b).

107 *Id.*

108 Canby, *supra* note 102, at 180.

109 28 U.S.C. § 1360(b).

The self-determination era began with an act of Congress opposed by the majority of tribes, the Indian Civil Rights Act of 1968 (ICRA).[110] The primary purpose of ICRA was to impose restraints very similar to the Bill of Rights on the tribes. Several provisions differ slightly, and others are missing altogether. For example, ICRA does not prohibit the establishment of religion as this would radically alter the character of some tribes, and does not guarantee counsel, civil juries, or large criminal juries in recognition of tribal poverty.[111] Most radically, ICRA provided for the writ of habeas corpus in federal court,[112] and limited criminal punishments to a maximum of $500 and six months in prison (extended to $5,000 and a year in prison in 1986).[113]

The imposition of certain civil rights restraints on tribal governments and other provisions, such as the direction to BIA to draft a model tribal court code, implied that Congress had decided that tribal governments had a future and was planning for it. One part of ICRA clearly indicated a break from termination policy. States could now give up their PL 280 jurisdiction over Indian country, and could only assume jurisdiction with the consent of the tribal membership through a rigorous referral process.[114] ICRA did not, however, revoke any of the earlier grants of PL 280 jurisdiction to the states.

In 1970, President Richard Nixon made the break clear in a message to Congress. He declared termination a failure and asked Congress to repudiate it, reaffirmed the trust responsibility of the federal government to the tribes, and called on Congress to legislate to enable an increase in tribal autonomy. Presidents Ronald Reagan, George Bush, and Bill Clinton have all reaffirmed the message.

Congress agreed. In 1973, Congress restored the federal relationship with Menominee, the largest terminated tribe. Several other restorations followed. In the next two decades Congress passed several significant measures that have eliminated many of the barriers to tribal self-government.

For instance, in 1975, Congress enacted the Indian Self-Determination and Education Assistance Act (ISDA). The Act recognizes the federal trust responsibility, acknowledges that federal domination of tribes stifled self-government and development, and that "Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons."[115] The substance of the ISDA then directs BIA and the Indian Health Service (IHS) to contract out to tribes most of the services administered by these agencies. The Act also authorized grants to help strengthen tribal management of Indian community services. Of great importance is the Act's explicit

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[110] Pub. L. No. 90-284, 82 Stat. 77 (codified as amended at 25 U.S.C. §§ 1301-03, 1321-22).

[111] 25 U.S.C. § 1302.

[112] *Id.* § 1303.

[113] *Id.* § 1302(7).

[114] *Id.* §§ 1321(a) & 1322(a).

[115] 25 U.S.C. § 450.

disclaimer that the law is in no way a termination of the federal government's trust responsibility to Indian tribes. Congress renewed its commitment in 1988:

> In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable Tribal governments, capable of administering quality programs and developing the economies of their respective communities.[116]

Congress passed many other statutes to encourage the protection of tribal government and Native American culture and religion. In addition to acts designed specifically to promote tribal government, Congress has brought tribes into a number of national programs: ISTEA[117] and environmental statutes, among others. Congress also has provided funding for tribal participation in those programs the way it does for states. See "Chapter Three: EPA's Approach to Environmental Protection in Indian Country" for a discussion of how Congress has explicitly brought tribes into some environmental statutes.

For the first time in history, the United States began to support tribal government actively as an end in and of itself, rather than a means to protect Indians for the time-being. It acknowledged, after nearly two centuries of assaults and insults to tribal self-government, that there was little use in attempting to eliminate tribes. It acknowledged that it should respect the will of its Indian citizens to maintain their tribal existence despite the odds. Over time this willingness to stop working against tribal government turned into active removal of barriers and then into devolution of tasks to tribes and support for taking on new areas of government. As the legislative and executive branches move down this path, however, the courts have had to address the states' challenges to tribal government in many areas, the limitations contrary to current policy placed on tribes in the past—sometimes the distant past—and, most of all, the undefined role of tribes in the federal system.

III. TRIBAL SOVEREIGNTY AND JURISDICTION

Congress and the Executive Branch have reaffirmed their support for the independence of tribes through policy statements and removal of barriers to participation in the national system as governments. Although this does not add to or detract from tribal sovereignty per se, it does make it more practical—in some cases possible—for tribes to exercise the powers that have always existed, but may have been used much less since the last century.

In the face of changing federal policy, most tribes have maintained—though not always exercised—their self-governing, sovereign nature.

A. The Source and Scope of Tribal Powers

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[116] Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, 102 Stat. 2285.

[117] The Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240.

The government's attempts to eliminate barriers to tribal government, support Indian tribal governments, and entrust them with more responsibility and encourage the resumption of governmental functions all depend on the tribes' independent ability to do so—tribal sovereignty. The term *'sovereignty'* is often used to mean the act of governing. Describing governing as the exercise of sovereignty may be more accurate.

Sovereignty is the right or power that comes from itself and no other source that a government draws upon to govern. The European conception of sovereignty that the United States received held that a nation could have only one sovereign, the monarch. The Constitution splits sovereignty between the states and the United States. Both sovereigns derive their authority to govern from the people, and neither depends on the other for its authority. The tribes represent the third, independent sovereign within the United States. The courts have reasoned that the tribes by dint of their existence since time immemorial, prior to the inception of the other two U.S. sovereigns, must derive their authority to govern from their own sovereignty. This stems from the original acknowledgment of the legitimacy of tribal government outside the United States. When *Worcester* held that the United States had brought the tribes within the United States, it also held that that act had not extinguished the tribal existence. Therefore, the same tribal sovereignty continued although the new relationship with the United States limited the exercise of that sovereignty.

1. Limitations

When the Marshall Trilogy recognized tribal sovereignty, it also established the first recognized limitations on tribal authority. *Johnson v. McIntosh* found that tribes could not convert their aboriginal title into fee title.[118] *Worcester v. Georgia* established that tribes within the territory of the United States could not make treaties with other powers.[119] The 1978 case *Oliphant v. Suquamish Indian Tribe* introduced the implied limitation that tribes could not prosecute nonmembers for criminal actions in Indian country, holding that it was inconsistent with their dependent status.[120] In 1981, the Supreme Court, in *Montana v. United States*, added another implied limitation.[121] The Court held that tribes lacked the power to apply their civil regulatory authority to nonmember activities on nonmember fee lands in Indian country unless the nonmembers had a consensual relationship with the tribes, or those activities affected tribal interests.[122] The courts have confirmed that tribes retain many more powers than they have lost, however; "In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."[123] Thus the inquiry, when looking at a disputed tribal power, begins not with a search for some grant of authority to the tribal government, but instead with an

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[118] 21 U.S. (8 Wheat.) 543 (1823).

[119] 31 U.S. (6 Pet.) 515, 559 (1832).

[120] 435 U.S. 191.

[121] 450 U.S. 544.

[122] *Id.* at 564-65.

[123] United States v. Wheeler, 435 U.S. 313, 323 (1978).

assumption that the tribe has that power. From there one must look to tribal and federal law to see if the tribe and federal government have imposed limitations on the exercise of that power.[124] This status is in some ways similar to that of the states. The Tenth Amendment reserves to the states all powers not delegated to the federal government by the Constitution in a similar manner to the way that tribes gave up a few powers to the United States, but reserved the rest. In the case of tribes, however, the Constitution does not bar the federal government from changing the balance of power to the detriment of the tribe. Although listing the limitations on tribes is easier, and enumerating all of the powers tribes still possess is impossible, a description of some of those powers may be useful.

2. *Tribal Powers*

Tribes may choose whatever form of government best suits their practical and cultural needs. For instance, tribes need not adopt forms of government patterned after the United States, including such elements as the separation of powers. Since the Constitution does not limit tribes, they do not have to separate their government from their religion.[125] After Congress passed IRA, most tribes did, however, adopt constitutions developed by BIA and patterned loosely after the U.S. Constitution.

Some tribes have adopted constitutions that describe their traditional form of government such as Seneca in New York and Muskogee (Creek) and Choctaw in Oklahoma. The constitutions of some tribes remain unwritten. The Santo Domingo Pueblo government has operated under the same unwritten constitution for centuries. Many tribal governments have blended traditional and nontraditional elements into their governments. For example, these governments may appoint traditional headmen to the tribal council for life, or provide that secular decision making be approved by the religious leadership. Tribal courts have borrowed quite extensively from other U.S. court systems and have developed extensive rules of procedure and evidence. However, tribal courts also rely on tribal tradition and often look for traditional or informal methods of dispute resolution.[126]

Tribes can legislate generally, adopting all manner of civil and criminal laws. This authority includes, but is not limited to, determination of domestic rights and relations, regulation of commercial and business relations, chartering of business organizations, disposition of nontrust property and establishment of rules of inheritance, land use regulation, power to raise revenues for the operation of the government, and power to administer justice through law enforcement and judicial systems.

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[124] Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 149 (1982); See National Farmer's Union Ins. Co. v. Crow Tribe, 471 U.S. 845, 852-53 (1985).

[125] ICRA prevents tribes from abridging the free exercise of religion, but does not bar the establishment of religion. 25 U.S.C. § 1302(1).

[126] American Indian Lawyer Training Program, Sourcebook on Federal-Tribal History, Law, and Policy 38 (1988).

Tribal governments possess the attributes of sovereignty, including immunity from suit. No party but the United States may sue a tribe without a waiver of immunity from the tribe itself or from Congress.[127] Tribal sovereign immunity does not extend to tribal officials acting outside of their official capacity.[128]

Tribes have the power to determine tribal membership. Rights such as voting, holding office, receiving tribal resources such as grazing and residence privileges on tribal lands, and participating in per capita payments usually depend on tribal membership. The Indian Civil Rights Act of 1968 imposes restrictions similar to a number of those contained in the Bill of Rights on tribal governments in dealings with tribal citizens and others who come under lawful tribal jurisdiction. [129]

B. Tribal Jurisdiction

Jurisdiction is the description of subject matters, acts, places, and people over which a government may assert control. In the United States there are constant struggles among the various governments to determine which ones have jurisdiction to hear a case or regulate a particular area. The most familiar occur between the federal government and state governments, but the most complicated may be those that involve tribes because they often implicate the powers of the federal government and state governments as well. Federal Indian law divides jurisdiction more strongly between civil and criminal halves than in other fields because of the different ways that they have developed.

1. Criminal Jurisdiction

Original tribal jurisdiction is inherent, complete, and exclusive over tribal members and territory. That condition changed substantially in the late 19th century. *McBratney* brought crimes by non-Indians against non-Indians in Indian country under the sole jurisdiction of the states. The Major Crimes Act and the Federal Enclaves Act granted concurrent jurisdiction to the federal government for certain enumerated crimes. This did not eliminate tribal jurisdiction, but it did pressure tribes not to prosecute. ICRA (as amended in 1986) limits the criminal punishments that a tribe can assess pursuant to its self-government to no more than $5,000 and a year imprisonment.[130] This essentially limited tribal courts to jurisdiction over misdemeanor offenses. *Oliphant* announced the farthest reaching limitation on tribal criminal jurisdiction, holding that tribes have no inherent authority over crimes by non-Indians.[131]

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[127] Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

[128] *Id.*

[129] Cohen, *supra* note 70, at 666-68.

[130] 25 U.S.C. § 1302(7).

[131] 435 U.S. 191 (1978). The Supreme Court later followed this reasoning to its logical conclusion, ruling that a tribe's criminal jurisdiction only reached its own members, not other Indians. Duro v. Reina, 495 U.S. 676 (1990). Six months later Congress amended ICRA to extend tribal criminal jurisdiction to nonmember Indians. 25 U.S.C. § 1301(2).

Tribes retain exclusive jurisdiction over crimes not enumerated in the Major Crimes Act, committed by Indians against Indians, or by Indians without victims. Tribes retain concurrent jurisdiction with the federal government for all other crimes committed by Indians. In either case, under ICRA they cannot assess the same punishments as other governments would for these sometimes very serious crimes.

2. Civil Jurisdiction

In the case of civil jurisdiction, the original conception of tribal jurisdiction essentially remains the same. In the seminal 1959 case, *Williams v. Lee*, the Supreme Court recognized that tribal courts have exclusive jurisdiction over claims arising in Indian country that implicate Indian interests.[132] Two decades later, *Montana v. United States* held that the Crow Tribe could not prohibit nonmember fishing on nonmember lands within its reservation.[133] However, the Court recognized that a "tribe may regulate . . . the activities of nonmembers who enter consensual relationships with the tribe or its members [or] the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[134] This became known as the *Montana* test, and it is exceptionally important because a significant amount of the lands in Indian reservations has been alienated from Indian ownership. The Supreme Court found that tribal civil adjudicatory authority extends to the same limits in *Strate v. A-1 Contractors.*[135] The Supreme Court applied the *Montana* test to a tort case that arose on a state highway on an Indian reservation and determined that the claim did not fall under the tribe's jurisdiction because it did not sufficiently affect the tribe.[136] For further discussion of tribal jurisdiction please see "Chapter Three: EPA's Approach to Environmental Protection in Indian Country."

3. Indian Country Jurisdiction

With some exceptions, the borders of Indian country determine the extent of tribal jurisdiction, the extent of certain types of federal jurisdiction, and the exclusion of state jurisdiction.[137] There are several different types of Indian country, and they are often found mixed together. The definition of Indian country was developed by the Supreme court in several cases, and then codified by Congress in 1948:

> "Indian country" . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state,

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[132] 358 U.S. 217.

[133] 450 U.S. 544 (1981).

[134] *Id.* at 565.

[135] 117 S.Ct. 1404 (1997).

[136] *Id.*

[137] DeCoteau v. District County Court, 420 U.S. 425, 427 fn.2 (1975); Ahboah v. Housing Auth. of the Kiowa Tribe, 660 P.2d 625 (Okla. 1983).

and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.[138]

Indian country also includes, among other types of land, lands held in trust by the United States for tribes, Indian Pueblos, Indian colonies, and rancherias.

Reservations: The terms "Indian country" and "Indian reservation" are often used interchangeably, although reservations are a subset of Indian country. Originally, reservations were those contiguous, undivided lands that Indian tribes kept when they ceded the rest of their lands to the United States. Today, however, reservations tend not to be undivided and may have been set aside from the public domain by an act of Congress, executive order, or treaty. The exterior boundaries of reservations often enclose lands not owned by the tribe, including, but not limited to, allotments and nonmember-owned fee lands. Both are considered part of the reservation, but the nonmember-owned fee lands may have implications for the exercise of tribal civil jurisdiction over nonmember activities there. The main, but not essential, factor is that either the tribe or the federal government has reserved the land, or the federal government has designated the lands as a reservation. Also, if Congress opened the reservation to non-Indian settlement it may have intended to diminish the size of the reservation, but must have made its intention explicit.[139] Outside of exterior reservation borders, the Supreme Court has held that the "reservation" category of Indian country includes tribal trust lands even if such lands have not been formally declared a reservation.[140]

Dependent Indian Communities: The Supreme Court in *Venetie* interpreted the term "dependent Indian communities" for the first time since passage of the Indian country statute. The Court held "that it refers to a limited category of Indian lands that are neither reservations nor allotments, and that satisfy two requirements—first, they must have been set aside by the federal government for the use of the Indians as Indian land; second, they must be under federal superintendence."[141] In so doing, the Supreme Court relied on its prior cases on which Congress had based the statute. In one such case, *United States v. Sandoval*, the Supreme Court termed the Pueblo Indian tribal lands "dependent Indian communities" based on Congressional recognition of the tribes' fee simple title and past federal guardianship.[142]

In *Venetie*, however, the Court decided there was no federal set-aside because Alaska Native Claims Settlement Act of 1971 (ANCSA) had revoked the reservation and transferred unrestricted settlement lands in fee to private, for-profit Native Village corporations, with the legislative goal of promoting self-

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[138] 18 U.S.C. § 1151.

[139] Solem v. Bartlett, 465 U.S. 463 (1984).

[140] Oklahoma Tax Comm'n v. Potawatomi Indian Tribe, 498 U.S. 505, 511 (1991); United States v. John, 437 U.S. 634, 648-49 (1978).

[141] Alaska v. Native Village of Venetie, 118 S. Ct. 948, 1998 U.S. LEXIS 1449,*13 (1998).

[142] 231 U.S. 28 (1913).

determination and avoiding "any permanent racially defined institutions, rights, privileges, or obligations."[143] Furthermore, the Court found that several aspects of ANCSA were inconsistent with continued federal superintendence, and did not agree that the continued provision of federal health, social, welfare, and economic programs supported a finding of federal superintendence.[144]

Allotments: Allotments are lands held in trust for the benefit of individual Indians by the United States. Between 1887 and 1934, 35 million acres of reservation lands were allotted to tribal members, of which only about eight million remained in tribal hands at the end of the allotment period. Originally, the United States would hold allotments in trust for the allottee and protect them from loss for 25 years or until BIA determined that the allottee was legally competent, whichever came first. At that point the allotment would convert to fee simple title, and be subject to no more restrictions or protections.[145] In 1934, the IRA allowed the Secretary of the Interior to extend indefinitely the length of the trust period for allotments.[146]

4. Other Jurisdiction

Ceded Territory: Aboriginal lands sold by treaty or agreement with the United States, and reservation lands sold to or taken by the United States are both generally called ceded territory. Many tribes retained rights to hunt, fish, and gather other resources in their former aboriginal territories. While these lands do not generally constitute Indian country, and a tribe cannot exercise exclusive jurisdiction over them, it may have regulatory authority over its members engaged in the reserved uses.[147] On the other hand, the ceded reservation lands remain part of the reservation, and therefore Indian country, unless Congress explicitly diminished the reservation when it took title to the land.[148]

Alaska Native Villages: Controversy continues to surround the status of Alaska Native villages, their authority, and their lands. The relationship of the federal government with Alaska Natives has differed significantly from that with the Indians of the contiguous 48 states. The isolation of Native settlement explains in large part the fact that there were no treaties with Alaska tribes and only three reservations. Federal neglect of Alaska ended with the discovery of oil and the subsequent need to achieve finality regarding the ownership of the land and mineral rights. The Alaska Native Claims Settlement Act of 1971 (ANCSA) extinguished the aboriginal title to all lands within the state, eliminated two of three Indian reservations and provided funds and lands to corporations, the shareholders of which would be the Alaska

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143 *Venetie*, 118 S. Ct. 948, 1998 U.S. Lexis 1449, *23 (quoting ANCSA, 43 U.S.C. §1601 (b)).

144 118 S. Ct. 948.

145 Cohen, *supra* note 70, at 131-34.

146 *Id.* at 148.

147 Settler v. Lameer, 507 F.2d 231 (9th Cir. 1974).

148 Solem v. Bartlett, 465 U.S. 463 (1984).

Natives. The Act did not terminate the tribal governments, the federal relationship or the federal trust responsibility.

In February 1998, the Supreme Court, in *Venetie*, answered one of the many questions not resolved by ANCSA—whether Alaska Native Villages could regulate nonmembers on ANCSA lands.[149] The Court decided that the fee lands owned by the federally-recognized Native Village of Venetie did not satisfy the test for dependent Indian community, and as such were not Indian country.[150] Since they are not Indian country the Village cannot regulate the activities of nonmembers on these fee lands.[151]

The status of Alaska Native governments as federally-recognized Indian tribes entitled to the powers, privileges, and immunities of other Indian tribes has been subject to conflicting views in the courts and Congress, as well as between the Alaska Natives and the State of Alaska. Alaska has broadly applied, "first territorial law and, later, state law,"[152] to Alaska Natives. Until recently, the State of Alaska consistently refused to recognize Alaska Natives as having independent tribal governments. Of particular controversy has been whether Alaska Native governments enjoy sovereign immunity from suit in state court; the Alaska Supreme Court has ruled they generally do not.[153]

On the other hand, the federal government has recognized Alaska Native governments for purposes of Native programs and services since many years before ANCSA.[154] BIA has recognized 226 Alaska Native entities as eligible for services and as having the powers and privileges of other tribes. Also, the Internal Revenue Service included those villages listed in ANCSA in the list of tribal governments eligible for benefits under the Tribal Tax Status Act of 1982.

There has sometimes been confusion as to which entity in a particular location is the federally-recognized tribal government because the same Alaska Native village may have an ANCSA village corporation, a municipal government formed under state law, and a traditional or an IRA council. Of the 210 Native villages recognized initially under ANCSA, 120 were organized as cities under state law, of which 71 have organized IRA councils, leaving at least 90 Alaska Native Villages governed solely by traditional village councils.[155] In many villages, both the municipal government and the IRA or traditional councils provide services to residents under different federal and state authorities. EPA's policy is to regard only the

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149 118 S. Ct. 948, 1998 U.S. LEXIS 1449 (1998).

150 *Id.*

151 *Id.*

152 Cohen, *supra* note 70, at 763-764.

153 Native Village of Stevens v. Alaska Management and Planning, 757 P.2d 32 (Alaska 1988).

154 David Case, Alaska Natives and American Laws 374 (1984).

155 *Id.* at 373.

governmental entity listed by BIA as the federally-recognized tribe under the EPA National Indian Policy and other federal laws and regulations applying to Indian tribes. As with other tribes, EPA determines the eligibility of Alaska Native tribes for EPA programs on a program-specific basis.

Oklahoma Tribes: The unique history of Oklahoma and the large number of tribes set Oklahoma Indian tribes apart. Indian country exists in Oklahoma, but its extent and character remain unsettled questions. Because Oklahoma at one point made up part of the Indian Territory—an area set aside for the removed tribes from other parts of the country—it has a unique history of close Congressional supervision. This has resulted in the elimination of much of the reserved tribal lands, and made it impossible to generalize about the specific powers of tribes, particularly in eastern Oklahoma. Much of the land remains in allotment or trust status and all tribes have broad powers of self-government. The Supreme Court of Oklahoma has also recognized the existence of Indian country in Oklahoma.[156] Although many issues remain concerning how to effectively implement environmental programs for Indian lands in Oklahoma and disputes over the extent of tribal jurisdiction are still ongoing, Oklahoma tribes generally possess the same types of governmental authority as other federally-recognized Indian tribes. This authority extends to civil regulatory jurisdiction over Indian country in the same way as other tribes.

IV. THE FEDERAL-INDIAN RELATIONSHIP

A. Federal Powers

The Congressional authority in Indian affairs is extremely broad. While the Constitution delegates the responsibility for regulating trade with the Indian tribes to the federal government, it does not describe the nature of the authority conveyed. Beginning with the Marshall Trilogy, the courts constructed a plenary power doctrine premised on the historical relationship between the federal government and the tribes that broadened the Congressional power to legislate as necessary beyond the specific delegations in the Constitution. As a result, the Supreme Court has upheld Congressional regulation of all aspects of Indian life, regardless of the consent or lack of consent by the tribes.

For some time the Supreme Court took the position that acts of Congress were presumptively in the best interest of Indians, and the Court would look no further.[157] The Supreme Court formally ended that era in *Morton v. Mancari*, announcing that Congressional acts must be "tied rationally to the fulfillment of Congress's unique obligation toward the Indians."[158] In 1980, the Supreme Court held in *United States v. Sioux Nation* that Congress had violated that standard in confiscating the Black Hills from the Sioux Nation, and finally denounced the Court's most famous approval of unfettered Congressional discretion,

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[156] Ahboah v. Housing Auth. of the Kiowa Tribe, 660 P.2d 625 (Okla. 1983).

[157] E.g., United States v. Kagama, 118 U.S. 375 (1886); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

[158] 417 U.S. 535 (1974).

Lone Wolf v. Hitchcock.[159] It has been argued, but never held, that the 5th Amendment requirement of due process bars the federal government from taking unjust actions toward Indians, such as extinguishing aboriginal title to moot a land claims case.[160]

B. Federal Trust Responsibility

The federal government has a trust responsibility to federally-recognized Indian tribes that arises from Indian treaties, statutes, executive orders, and the historical relations between the United States and Indian tribes. Like other federal agencies, EPA must act in accordance with the trust responsibility when taking actions that affect tribes.[161] While the precise legal contours of the federal trust responsibility have not been fully defined, one may describe the trust responsibility in terms of its general and specific components (although the line between these two components is not always clear).

The general component of the trust responsibility relates to the United States' unique legal and political relationship with federally-recognized Indian tribes. It informs federal policy and provides that the federal government consult with and consider the interests of the tribes when taking actions that may affect tribes or their resources. Courts have not required particular procedures, but generally have looked to see whether federal agencies have sought the views of tribes and considered their interests. Nonetheless, President Clinton, in a 1994 memorandum, directed all federal agencies to assess the impacts of their plans, projects, programs, and activities on tribal trust resources, assure that tribal rights and concerns are considered in decision making, and, to the extent practicable and permitted by law, consult with tribal governments before taking actions that affect them.[162] The Supreme Court has noted that the federal government, as trustee, is "charged with moral obligations of the highest responsibility and trust."[163] The general trust provides one basis for the legal principle that ambiguities or doubts in statutes must be construed in favor of Indians. Citing the Indian Tribal Justice Act, the Department of Justice recently noted that the general trust responsibility "includes the protection of the sovereignty of each tribal government."[164]

The specific component of the trust responsibility ordinarily arises only from some formal action of the United States such as a statute, treaty, or executive order. Congress plays the primary role in defining the

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[159] 448 U.S. 371, 413-14 (1980).

[160] Archibald Cox, Memo, *reprinted in* Getches, et al., Federal Indian Law (1994).

[161] Nance v. EPA, 645 F.2d 701, 711 (9th Cir.), cert. denied, Crow Tribe v. EPA, 454 U.S. 1081 (1981).

[162] Presidential Memorandum on Government-to-Government Relations with Native American Tribal Governments 2 (April 29, 1994).

[163] Seminole Nation v. United States, 316 U.S. 286, 296 (1942).

[164] Department of Justice Policy on Indian Sovereignty and Government-to-Government Relations with Indian Tribes 4 (June 1, 1995) (quoting 25 U.S.C. § 3601).

trust responsibility. The federal courts often discuss the specific trust responsibility in terms of a fiduciary relationship that arises when the government assumes such elaborate control over Indian trust assets that the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (a tribe or an individual Indian), and a trust corpus (timber, lands, funds, etc.).[165] It is easy to envision the trust corpus in situations where Congress has directed a federal agency to manage particular resources, such as timber or lands, for the benefit of tribes. Applying the trust corpus principle to a regulatory agency like EPA raises unique issues. Nonetheless, it is clear that EPA must ensure that its actions are consistent with the protection of tribal rights arising from treaties, statutes, and executive orders. Further discussion of the specific trust with respect to EPA can be found in the tribal rights section below.

V. DISTINCTIVE TRIBAL RIGHTS

Indian tribes often have distinctive rights that arise from treaties, statutes, executive orders, agreements, or as a result of aboriginal title, including rights in land and water, and the right to fish, hunt, and gather. A number of these rights relate to or depend on environmental protection. Although the following discussion focuses on treaties and rights arising from treaties, tribal rights—including rights regarding land, water, fishing, hunting, and gathering—also arise from other legal instruments such as statutes and executive orders. Much of the analysis below regarding treaties also applies to rights embodied in these other instruments.

A. Treaties

Through treaties, Indian Nations ceded certain lands and rights to the United States and reserved certain lands ("reservations") and rights for themselves. In many treaties (especially those negotiated during the 1850s and 1860s), tribal governments reserved hunting, fishing, and gathering rights in territories beyond the land that they reserved for occupation. In the Northwest treaties, these were typically called "usual and accustomed" places.[166] Generally, unless changed or abrogated by a subsequent treaty or statute, treaties are still the supreme law of the land. In 1832, Chief Justice John Marshall said:

> The words 'treaty' and 'nation' are words of our language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians as we have applied them to other nations of the earth. They are applied to all in the same sense.[167]

1. Canons of Treaty Construction

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[165] United States v. Mitchell, 463 U.S. 206, 224 (1983).

[166] E.g., Treaty of Medicine Creek, 10 Stat. 1132 (1855); See Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979).

[167] Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559-60 (1832).

Courts follow certain canons of construction in interpreting treaties and other federal legal instruments regarding Indians. These principles of interpretation were developed largely to reflect the unequal bargaining position that Indians held in relation to the United States. Indians were often at a disadvantage because, for example, negotiations with Indians were generally conducted in foreign languages, such as English, and the cultural traditions were different, such as the concept of land ownership. Thus, as a general matter, the Supreme Court has held that ambiguities in treaties are to be construed liberally to favor Indians.[168] In addition, in construing treaties, the courts have stated that several other canons of interpretation are to be followed, such as treaties that are to be construed as the Indians would have understood them at the time of signing; treaty interpretation should rely on promotion of the treaty's central purpose, not technical rules; and treaties should be read in light of the prevailing notions of the day and the assumptions of those who drafted them.

Several very important Indian law principles have resulted from these canons of construction. For example, the courts have held that a number of resource rights, such as water, hunting, and fishing rights, may be implied from a treaty's purpose, even if the rights were not explicitly mentioned in the treaty. In addition, these canons have resulted in the principle that Congress must show a "clear and plain" intent in order to abrogate Indian treaty and other rights. The canons of construction have been extended to apply to the interpretation of statutes, executive orders, and other instruments of federal law, as well as to the existence of aboriginal title.

2. Continued Validity and Significance of Treaties

Some people unfamiliar with Indian history and Indian law do not acknowledge Indian treaty rights because they incorrectly believe that a breach or violation of any part of a treaty on the part of the United States has somehow nullified the treaties. As a general rule, Congress must specifically and directly repeal a treaty by legislation to invalidate it. Age alone has not invalidated treaties as the "supreme law of the land."[169] In fact, unless abrogated, treaties remain valid documents that have the same force as federal statutes.

Treaties are very important in understanding the rights of Indian governments and Indian people today. In *Washington v. Passenger Fishing Vessel Association*, the United States Supreme Court ruled on the validity of treaties signed in 1854 with Indians of the Pacific Northwest. In its 1979 decision, the Court stated: "A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations."[170] The Court also affirmed general principles about treaties and recognized that, through treaties, Indian Nations granted certain rights to the United States and reserved land and rights for themselves.

Treaties are significant to all tribes, even to those tribes that did not enter into treaty relations with the federal government, for several reasons. First, treaties established a pattern of legal and political

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[168] E.g., Choctaw Nation v. United States, 318 U.S. 423, 431-32 (1943).

[169] United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188, 196 (1876).

[170] 443 U.S. 658, 675.

interaction based on negotiation between two sovereigns. Second, treaties form the foundation of federal Indian law affecting all tribal governments. Finally, even though some tribes did not formally enter into a treaty with the federal government, subsequent dealings through executive orders or legislation generally have been based on a series of consultations and negotiations between a tribe and the federal government, similar to the treaty process.

B. Land Rights

Indian tribes and individual Indians have rights in land that were established and are held in varying ways. The term "Indian lands" generally refers to "those lands that are held by Indians or tribes under some restriction or with some attribute peculiar to the Indian status of its legal or beneficial owners."[171]

C. Fishing, Hunting, and Gathering Rights

In a number of Indian treaties, tribes explicitly reserved rights pertaining to the environment, including rights to fish, hunt, and gather. Some treaties explicitly reserve such rights within Indian reservations. In several cases, particularly in the Pacific Northwest and the Great Lakes regions, tribes not only reserved such rights within reservation areas, but also retained rights in ceded territories that were their "usual and accustomed" hunting, fishing, or gathering places.

Some treaties do not contain any explicit reservation of hunting, fishing, or gathering rights. Nonetheless, courts have held that treaties carry those rights necessary to realize the primary purposes of the treaty.[172] This principle is well-established in the context of reserving sufficient water rights to meet a tribe's present and future irrigation needs.[173] It may also encompass the purity of the water supplied for irrigation.[174] Courts have also found implicit rights in treaties and statutes pertaining to fisheries and subsistence hunting.[175]

An important question is whether fishing and hunting rights include rights to a sustainable natural environment upon which fish and game depend.[176] Since rights necessary to the primary purpose of a treaty may be implied, another important question is whether treaties generally reserve rights to environmental quality since almost all treaties were designed to reserve a permanent homeland for tribes. These questions are particularly relevant to EPA's programs.

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[171] *See generally* William Canby, American Indian Law 256 (2d. ed. 1988).

[172] E.g., Winters v. United States, 207 U.S. 564, 576-77 (1908).

[173] E.g., Arizona v. California, 373 U.S. 547, 600 (1963).

[174] United States v. Gila Valley Irrigation District, 920 F.Supp. 1444 (D.Ariz. 1996), *aff'd, adopted*, 117 F.3d 425 (9th Cir. 1997).

[175] E.g., Parravano v. Masten, 70 F.3d 539, 546 (9th Cir. 1995), cert. denied, Parravano v. Babbitt, 518 U.S. 1016 (1996).

[176] In United States v. Washington, 506 F.Supp. 187, 205 (W.D. Wash. 1980), the court found that "it is necessary to recognize an implied environmental right in order to fulfill the purposes of the fishing clause" of the treaty at issue. However, this decision was reversed by the Ninth Circuit Court of Appeals on procedural grounds. United States v. Washington, 759 F.2d 1353, 1357 (9th Cir. 1985) (*en banc*).

Federal, state, and local agencies need to refrain from taking actions that are not consistent with tribal rights wherever they exist, whether within Indian country or in ceded areas. A tribe's right to fish, hunt, or gather, within or outside Indian country, is generally not subject to state regulation. However, a state may impose restrictions if they are reasonable and necessary conservation measures and the application of the restrictions to Indians is necessary in the interests of conservation.[177]

D. Water Quantity Rights

Indian tribes often have rights to a quantity of water under the *Winters* doctrine. In *Winters v. United States*, the Supreme Court held that the 1888 agreement establishing the Fort Belknap Reservation in Montana implicitly reserved the right to use the waters of the Milk River.[178] While the agreement described one boundary of the reservation as being the middle of the Milk River, it made no mention of the rights to use the water. After the agreement was signed, non-Indian settlers upstream from the reservation built dams that diverted the flow of the river and interfered with agricultural uses by the Indians. The United States brought suit on behalf of itself and the affected Indians to enjoin the upstream users from diverting the water. Although the 1888 agreement made no mention of water rights, the Supreme Court found that the parties implied the right of a sufficient quantity of water to irrigate the arid Reservation land, because without water, the purpose of the agreement would be frustrated. The tribes of the Fort Belknap reservation, by reserving lands for farming and pastoral purposes, had implicitly reserved waters necessary to make those uses possible in the 1888 agreement.

The *Winters* doctrine applies to Indian country areas whether created by treaty, agreement, executive order, statute or order of the Secretary of the Interior.[179] The doctrine has been held to apply to groundwater as well as surface water.[180] In addition, the *Winters* doctrine may include the protection of a degree of water quality as well as water quantity.[181]

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[177] Antoine v. Washington, 420 U.S. 194, 207 (1975).

[178] 207 U.S. 564 (1908).

[179] Cohen, *supra* note 70, at 579.

[180] Cappaert v. United States, 426 U.S. 128 (1976).

[181] See United States v. Anderson, 591 F. Supp. 1, 5 (E.D. Wash. 1982) (retention of the right to water for a fishery includes the maintenance of a proper water temperature to sustain the fishery); Cohen, *supra* note 70 at 587.

CHAPTER THREE: EPA's APPROACH TO ENVIRONMENTAL PROTECTION IN INDIAN COUNTRY

I. INTRODUCTION

The mission of the United States Environmental Protection Agency (EPA) is to protect human health and to safeguard the natural environment—air, water, and land—upon which life depends. From its origin, EPA has led the nation in controlling pollution and other environmental risks. As a result of EPA actions, it can be said that our air, land and water are now much safer and cleaner than 25 years ago despite population increases and continued economic expansion.

Although this substantial progress has been made, there are still many human health and environmental challenges that cannot be met with traditional media-specific "command and control" approaches. For example, it has been posited that children, Native American tribal communities, and other minority populations and low-income populations suffer disproportionately from adverse health effects caused by some environmental conditions. Until very recently, there has not been a fully concerted effort to do environmental work in Indian country. To address these specific needs, EPA has created a number of innovative multimedia programs that rely on the active participation of the affected communities to reduce human health and environmental risks in the most effective manner.[182]

One of these programs is the EPA Indian Program. It involves significant intra-Agency and multimedia activities designed to ensure protection of human health and the tribal environment, in a manner consistent with EPA's trust responsibility to federally-recognized tribes, the government-to-government relationship, and the conservation of cultural uses of natural resources.

A. The Importance of the Indian Program

The responsibilities of the Indian Program include protecting the health of millions of Indians and non-Indians residing in Indian country, addressing the environmental needs of 560 tribal nations, and safeguarding the natural environment.[183] EPA's role is critical. Native Americans have the worst health statistics in the country, and environmental mitigation in tribal communities is significantly behind that of non-tribal communities. It is imperative that EPA enhance its partnership with the tribes and work with tribes to identify and achieve environmental goals.[184]

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[182] U.S. Environmental Protection Agency, EPA Strategic Plan 7, 80 (1997).

[183] Department of Interior, Bureau of Indian Affairs, Indian Entities Recognized and Eligible to receive services from the United States Bureau of Indian Affairs, 62 FR 55270 (1997).

[184] *Id.* at 85-86.

B. Objectives of the Indian Program

In 1984, EPA became the first federal agency to adopt a formal Indian policy. When the policy was reaffirmed in 1994, an action agenda was established for enhancing and strengthening tribal operations. A key element was a commitment to fully institutionalize the policy into Agency activities. The American Indian Environmental Office (AIEO) was established and the Tribal Operations Committee (TOC) was formed to help EPA identify Indian environmental priorities and issues for discussion and resolution on how EPA can improve its program delivery and implementation. Through this ongoing dialogue, key objectives for program implementation have evolved. As an Agency, we want to:

- achieve adequate environmental infrastructure throughout Indian country;
- complete Tribal and EPA Environmental Agreements (TEAs) with every Tribe. These agreements would contain a tribal environmental conditions baseline assessment, tribal environmental priorities, and joint commitments to achieve these priorities;
- implement fully the 1984 EPA Indian policy;
- increase significantly the number of tribes implementing environmental programs;
- build capacity and adequate internal mechanisms to help tribes implement environmental programs that meet the needs established in tribal baseline assessments and, in the absence of tribal implementation, establish means for EPA implementation; and
- establish a mechanism, in partnership with tribal and state governments, to resolve transboundary issues.[185]

C. How To Accomplish Objectives

These objectives can be met through a combination of actions including:

- increased tribal capacity-building efforts;
- greater implementation of environmental programs within Indian country;
- expanded education for EPA employees regarding tribal environmental issues;
- increased technical assistance and training for tribal environmental program managers;
- continued intra-agency, multimedia coordination of Indian program activities by the American Indian Environmental Office and others;
- improved coordination with tribes to achieve environmental goals and priorities identified by tribal governments in tribal and EPA environmental agreements; and
- to the extent possible and as aggressively as possible, increase resource investments in environmental management.[186]

Although accomplishing successful environmental management in Indian country is not easy, the Agency has found ways to make it happen over time. These ways are described in more detail in the remainder of

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[185] *Id.* at 86.

[186] *Id.*

this chapter. Program policies, implementation methods, and the organizational infrastructure developed to implement tribal programs are discussed. Also, because environmental protection in Indian country often requires the assistance and cooperation of other federal agencies, some key agencies involved in this field are described.

II. FEDERAL AND EPA POLICIES

A number of executive orders and policies provide strong guidance to federal agencies on how they are to consult with and consider tribal interests when taking actions. An illustrative selection of the most relevant policies and executive orders is discussed below. Copies of the full text can be found in the appendix.

A. Executive Order on Consultation and Coordination with Indian Tribal Governments

On May 14,1998, President Clinton issued Executive Order 13084 entitled "Consultation and Coordination with Indian Tribal Governments." The effective date of Order 13084 is August 12, 1998. It is intended to supplement but not supersede President Clinton's Executive Memorandum of April 29,1994 on "Government-to-Government Relations with Native American Tribal Governments." Executive Order 13084 directs federal agencies to do a variety of things, some of which are listed below.

- In formulating policies significantly or uniquely affecting Indian tribal governments, agencies should be guided to the extent permitted by law, by principles of respect for tribal self-government and sovereignty, treaty and other rights, and for responsibilities arising out of the federal government's unique relationship with tribal governments.

- There shall be effective processes to permit tribal governments to provide meaningful and timely input in the development of regulatory policies affecting tribal communities.

- Agencies should prevent the promulgation of regulations that impose substantial direct compliance costs on tribal governments, unless certain exceptions apply.

- Where possible, agencies should streamline waiver processes of statutory or regulatory requirements with a view toward increasing opportunities for tribal governments.

- In issues relating to tribal self-government, trust resources, or treaty and other rights, agencies should explore and where appropriate, use consensual mechanisms for developing regulations.

The above summary is only a very broad summary. The Executive Order, which is included in the appendix should be read thoroughly.

B. Presidential Memorandum on Government-to-Government Relations With Native American Tribal Governments

On April 29, 1994, President Clinton issued a memorandum to the heads of all executive departments and agencies of the federal government regarding government-to-government relations with Native American Tribal governments. This memorandum states that executive department and agency activities affecting tribal rights or trust resources should be implemented in "a knowledgeable, sensitive manner respectful of tribal sovereignty." This memorandum further provides that Executive Branch activities shall be guided by several principles. The memorandum provides that executive departments and agencies shall:

- operate within a government-to-government relationship with federally-recognized Indian tribes;
- consult, to the greatest extent practicable and to the extent permitted by law, with Indian tribal governments before taking actions that affect federally-recognized tribes;
- assess the impact of executive department and agency activities on tribal trust resources and assure that tribal rights and concerns are considered during the development of such activities;
- take appropriate steps to remove procedural impediments to working directly and effectively with tribal governments on activities that affect the trust responsibility and/or governmental rights of tribes;
- work cooperatively with other federal departments and agencies, where appropriate, to accomplish these goals established by the President; and
- apply the requirements of Executive Orders Nos. 12875 ("Enhancing the Intergovernmental Partnership") and 12866 ("Regulatory Planning and Review"), tailoring federal programs in appropriate circumstances to address the unique needs of tribal communities.

C. EPA Indian Policy

This policy was first issued by EPA in 1984 and has since been reaffirmed by every subsequent Agency Administrator, including Carol Browner in March 1994. The policy is intended to provide guidance to EPA staff and managers in dealing with tribal governments and in responding to the problems of environmental management on Indian reservations in order to protect tribal health and environments. In carrying out EPA programs, the policy establishes nine principles.

1) The Agency stands ready to work directly with Indian Tribal governments on a one-to-one basis (the "government-to-government" relationship), rather than as subdivisions of other governments.

2) The Agency will recognize tribal governments as the primary parties for setting standards, making environmental policy decisions and managing programs for reservations, consistent with Agency standards and regulations.

3) The Agency will take affirmative steps to encourage and help tribes assume regulatory and program management responsibilities for reservation lands.

4) The Agency will take appropriate steps to remove existing legal and procedural impediments to working directly and effectively with tribal governments on reservation programs.

5) The Agency, in keeping with the federal trust responsibility, will assure that tribal concerns and interests are considered whenever EPA's actions and/or decisions may affect reservation environments.

6) The Agency will encourage cooperation between tribal, state, and local governments to resolve environmental problems of mutual concern.

7) The Agency will work with other federal agencies that have related responsibilities on Indian reservations to enlist their interest and support in cooperative efforts to help tribes assume environmental program responsibilities for reservations.

8) The Agency will strive to assure compliance with environmental statutes and regulations on Indian reservations.

9) The Agency will incorporate these Indian policy goals into its planning and management activities, including its budget, operating guidance, legislative initiatives, management accountability system and ongoing policy and regulation development processes.

This policy was accompanied by an implementation guidance that established the National Indian Work Group consisting of Indian coordinators to be appointed in each of the Headquarters program offices and Regional offices. In addition, the guidance formally placed responsibility for the implementation of tribal environmental programs in three EPA Offices where it remained until the establishment of the American Indian Environmental Office in October 1994.

D. Other Policies and Guidance

1. Executive Order and Memorandum on Environmental Justice

Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,* and its accompanying memorandum were issued in February 1994. The Executive Order is designed to focus federal attention on the environmental and human health conditions in minority communities and low-income communities and to promote nondiscrimination in federal programs substantially affecting human health and the environment. Specifically, section 6-606 of the Order states

that "each Federal agency responsibility set forth under this order shall apply equally to Native American programs." The Order also specifically addresses subsistence consumption of fish and wildlife. The accompanying memorandum identifies the need for federal agencies to consider environmental justice implications when taking actions subject to the National Environmental Policy Act. The memorandum also directs EPA, in its environmental reviews under section 309 of the Clean Air Act (CAA), to ensure that agencies fully consider environmental effects on minority communities and low-income communities, including those on tribal communities.

EPA has cited these presidential directives in its reviews of environmental effects of proposed actions of other federal agencies under National Environmental Policy Act (NEPA) and section 309 of the CAA.

2. Executive Order on Sacred Sites

Executive Order 13007 was issued in May 1996 to encourage land management agencies to (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites. The Order applies to federally-owned lands, except "Indian Trust lands." This Order reflects the federal government's continuing commitment to the religious freedom of all Americans. The Order complements the procedures required by the American Indian Religious Freedom Act, the Native American Graves Protection and Repatriation Act, the Archaeological Resources Protection Act, the National Historic Preservation Act and the Presidential Directive of 1994, requiring Executive Branch departments and agencies to accommodate, as appropriate, the need for eagle feathers in the practice of American Indian religion.

3. Federal, Tribal, and State Roles in the Protection and Regulation of Reservation Environments (Concept Paper)

Administrator William Reilly endorsed this concept paper in a July 1991 memorandum to EPA managers. This paper was designed to formalize EPA's role in strengthening tribal governments' management of environmental programs. At that time, like today, the Agency was under pressure from some states to approve state programs on portions of Indian reservations. The paper expresses the objective of providing for coherent and consistent environmental regulation in reservations by avoiding checkerboarding of regulatory programs on Indian reservations. The paper also recognizes that differences between the interests of tribal and state governments can be sensitive and sometimes extend well beyond the specific issues of environmental protection. Thus, the paper also directs EPA staff to promote cooperative approaches to environmental problems that involve both tribes and states. The principles behind the approaches are administrative clarity in the operation of regulatory programs, effective and efficient environmental management, and the support of tribal self-determination.

4. Tribal Operations Action Memorandum

AIEO is only one component of the Agency's effort to strengthen the public health and environmental protection in Indian country and to improve EPA's government-to-government partnership with tribes. In July 1994, Administrator Browner issued a memorandum outlining steps for prompt implementation throughout the Agency. The action items are as follows:

- establish Tribal-EPA Environmental Agreements (TEAs);
- establish program and regional work plans based on TEAs;
- implement management and compliance activities;
- review program and regional Indian program organization and—where necessary—modify the organization to strengthen tribal operations;
- ensure that an effective EPA-tribal liaison capacity exists to provide direct field assistance to tribes;
- provide training to EPA management and staff on how to work effectively with tribal governments;
- enhance communications with tribes;
- use available discretion to consolidate issuance and administrative requirements of grants; and
- invest resources into tribal operations.

Please see the attached copy of the July 1994 Action Memorandum for more detail on each of the Administrator's priorities for the Agency's Indian Program.

5. *EPA Environmental Justice Strategy*

EPA issued this strategy in April 1995 in response to Executive Order 12898 on environmental justice. Among other actions, the strategy specifically addresses environmental protection of American Indians, Alaska Natives, and other Indigenous populations. Many of the initiatives outlined in the strategy are steps towards achieving more public participation and environmental protection for American Indians and other indigenous communities. The strategy calls on the Agency to continue to work to protect and improve tribal health and environmental conditions by "providing outreach, education, training, and technical, financial, and legal assistance to develop, implement, and maintain comprehensive tribal environmental programs." The strategy also states that when the Agency is conducting "human health and environmental research and other activities involving Tribal and Indigenous environments and activities [the Agency is to] take into account cultural use of natural resources."

6. *EPA Regional Policies for Environmental Protection in Indian Country*

EPA Region 8 issued a policy in March 1996 to provide detailed guidance and information to the region's managers and staff on how to implement EPA's Indian policy. This guidance is intended to respond to and clarify questions that are most frequently raised by both internal and external Region 8 customers and constituents, relating to 1) regional protocol in working with federally-recognized tribes; 2) regional support of federally-recognized tribal governments in building capacity to manage environmental programs; and 3) regional positions on environmental program responsibilities and jurisdiction. Several other regions have developed or are developing their own written policies.

7. *Memorandum of Understanding Between the Bureau of Indian Affairs, the Environmental Protection Agency, the Department of Housing and Urban Development, and the Indian Health Service*

The Bureau of Indian Affairs, the Environmental Protection Agency, the Department of Housing and Urban Development, and the Indian Health Service entered into a Memorandum of Understanding (MOU) in June 1991. The MOU recognizes that each of the agencies has responsibilities and interests pertaining to the protection of human health and the environment as it relates to pollution control on Indian lands. The purpose of the MOU is to identify areas of mutual interest and responsibility of the four agencies and to encourage the coordination of the agencies' activities to promote the most efficient and integrated use of resources.

8. Enforcement

The EPA has a long-standing Indian policy that its relationship with tribal governments shall be government-to-government. When implementing the enforcement and compliance assurance program, the Regions should make every effort to notify the tribal government before visits to Indian country. In addition, the enforcement personnel should inform the tribal government of the results of the visit or any planned enforcement actions. If advance notice is not given (circumstances beyond the control of EPA staff or an unannounced inspection), the tribal government should be contacted as soon as possible. Within the Regional office, the enforcement personnel should inform the assigned Regional Tribal Coordinator of planned activities and any planned enforcement actions.

EPA should make every effort to pursue enforcement and compliance activities in a timely and effective manner that is consistent with EPA's Indian policies, Regional agreements with Indian tribes, and EPA's enforcement policy. By following these policies, the Regions can ensure they respect the tribes' rights to self-government and that they safeguard EPA's enforcement discretion and information. For facilities owned or managed by the tribal government, EPA will work cooperatively with the tribal government to help the facility return to compliance. The Regional enforcement program wishing to proceed with an enforcement action should consult with the tribal coordinator, the tribal Office, Office of Regional Counsel, and obtain the concurrence of the Assistant Administrator for the Office of Enforcement and Compliance Assurance.

For questions of potential liability of a tribal government or specific statutory requirements or roles the regions should consult with the Office of Regional Counsel. The Office of Regional Counsel also should coordinate with the Office of General Counsel on these issues.

9. Protocol for EPA Interactions With Tribes

There is not one set of rules that can guide EPA management and staff to successful interactions with tribes. Rather, there are general considerations that should be reviewed before communicating with tribes and visiting Indian country. Each of the Regional offices and various offices within the Agency may wish to establish guidelines on protocol. These guidelines could cover such items as who should call the tribal chair person, who should be contacted at a reservation before an EPA representative visits, who should sign correspondence with a tribe, and how tribal-EPA meetings should be conducted. For an example of a Regional protocol guideline, please see the attached Region 8 Policy.

Individual tribes are unique and differ in leadership and in the governmental and economic infrastructure. It is most important for EPA employees to approach all tribes with respect and sincerity about forging a relationship.

EPA staff who work with tribes on a regular basis have offered the following reflections on their experiences interacting with tribes:

- Tribes often have two tiers of government (legal/political and traditional). In other words, the titular head is not always the decision-maker. It is important for EPA personnel to learn the system of government used within a specific tribe before making initial contact.

- Indian people have been hurt by government initiatives so many times before that they are often skeptical of new proposals. Relationship building, education, and time are needed to overcome this.

- EPA has its own culture that can impede communication when others do not understand the vocabulary, the philosophy, and/or the methods.

- It is important to remember that environmental protection issues are not the only areas of concern tribal governmental leaders face. Most tribal governments deal with significant unemployment, education, health, welfare, jurisdictional, and other issues. Additionally, keep in mind that in many instances, tribal governments are understaffed and have limited resources.

- Indian leaders (particularly tribal chairpersons, chiefs, governors, presidents) are extremely concerned about the lives of their people on a micro level. It is not uncommon for a leader to sit by the bedside of a terminally sick member and interact with members on a family or individual level. This concern often results in differences between tribal, state, and federal standards regarding government-approved risk. While EPA may find 1/1,000,000 is an acceptable risk, to Indian people, each member of a small tribe is vitally important and therefore, the tribe may find the EPA risk standard unacceptable.

Interactions with tribes should be guided by the President's Executive Memorandum, the EPA Indian Policy and the President's 1998 Executive Order.

III. PROGRAM IMPLEMENTATION

EPA works on a government-to-government basis with federally-recognized tribes, but in some instances may provide funding and technical assistance to non-federally-recognized tribes through the Environmental Justice program, and certain other programs (e.g., the Superfund technical assistance grant program, CWA section 104 grant program).

Some general principles for implementing EPA's program in Indian country are listed below.

- EPA has been delegated authority by Congress to ensure that environmental programs designed to protect human health and the environment are carried out across the United States.
- Tribes may apply for approval to implement many of the federal environmental programs.
- Consistent with federal law, tribal governments generally have regulatory authority over environmental quality within their own territory.
- Generally, in the absence of an EPA-approved tribal program in Indian country, EPA will directly implement federal environmental statutes.
- EPA acts consistent with its federal trust responsibility in implementing federal environmental statutes.

There are four important components in implementing environmental programs in Indian country under EPA's statutes—building capability, authorizing of tribal programs, directly implementing programs by EPA, and taking cooperative approaches to implementation.

A. Building Capability

EPA's Indian policy states that "[t]he Agency will take affirmative steps to encourage and assist tribes in assuming regulatory and program management responsibilities for reservation lands." The first step is to help tribal nations build their own capability to manage environmental programs. Capability building, sometimes referred to as "capacity building," entails providing tribes with financial assistance, information, and technical assistance to establish the necessary tribal administrative infrastructure to institute environmental programs. In addition, capability building includes building the capacity of EPA through training, information gathering, and financial resources to assist and better work with tribes in implementing environmental programs in Indian country.

1. Financial Assistance

A significant source for building capability is through grants provided under the Indian Environmental General Assistance Program (GAP) Act. The objectives of the GAP Act are to provide funds to federally-recognized tribal governments to build capacity to administer environmental programs and to provide technical assistance from EPA in the development of multimedia programs. Capability-building activities eligible for funding under GAP include planning, hiring staff, monitoring, and assessing environmental resources and pollution threats. GAP provides tribes with an opportunity to build a core environmental program and prioritize environmental problems.

Many EPA program-specific grants also help to build tribal environmental capability and can be used in concert with GAP grants to establish an integrated tribal environmental program. As discussed below, in order for tribes to receive certain grants, tribes must include information with their grant application

establishing their eligibility for "Treatment in the same manner as a State" (TAS) under the specified statutory and regulatory criteria.

Another important tool is the Performance Partnership Grant (PPG). A PPG is a multi-program grant to a tribal or State agency by EPA from funds allocated and otherwise available for categorical grant programs. PPGs provide tribes and states with the option to combine funds from two or more specified categorical grants into one or more PPG. The purpose of PPGs are to allow tribes and states to have the flexibility to address their highest environmental priorities across all media and establish resource allocations based on those priorities, while continuing to address core environmental program commitments. PPGs are also intended to help grant recipients and EPA to reduce administrative burdens and costs by greatly reducing the numbers of grant applications, budgets, work plans, and reports.

PPGs, in conjunction with the tribal-EPA Environmental Agreements (TEA) and the GAP, should allow tribes additional flexibility in developing and implementing their environmental programs according to tribal needs and priorities. Tribes may include GAP funds in a PPG. In order to maximize the available flexibility under a PPG, tribes must develop a plan that specifies how program funds will be reallocated and what environmental outcomes are expected from the expenditure of those funds. The Agency has issued interim guidance on PPGs for state and tribal environmental programs and is developing new regulations for PPGs and the administration of continuing environmental programs to take into account the new flexibility offered by the PPGs.

2. Technical Assistance

In addition to grants, EPA also provides technical assistance to tribes to help them develop and implement their environmental programs. This assistance can be found across most EPA programs with activities in Indian country. EPA has hosted training sessions for tribal environmental staff on major environmental statutes, regulations, permit writing, grant application preparation, and compliance requirements. To assist young environmental professionals, EPA has supported Native American internship programs. Technical support and development of technical capability can also be accomplished through Inter-Personnel Assignments. This helps to provide participants with an understanding of EPA programs, policies, and technical resources.

EPA also provides technical assistance to tribes in the form of information sharing. Agency guidance documents and technical resource information are made available to tribal environmental staff to support their technical needs. EPA also conducts and hosts workshops, conferences, and seminars nationally with tribal organizations. These national events provide an excellent forum to resolve technical issues, identify project support needs, report on success stories, and to exchange pertinent environmental program information and concerns.

Another important resource EPA provides to tribes in Indian country is direct on-site technical support. EPA program staff have provided assistance to tribal environmental offices in the field on the design, construction, and compliance features required for solid waste landfills, underground storage tanks, wastewater treatment systems, in addition to guidance on recycling programs and air quality management.

3. Information

Tribal-EPA Environmental Agreements. To build EPA's Indian program in a manner consistent with tribal environmental priorities and EPA's statutory responsibilities, AIEO is working with the regional offices as they develop TEAs. As designed by EPA in consultation with tribal leaders and environmental directors, TEAs describe the past and current condition of a tribe's environment, and the Tribe's long-range environmental goals and near-term priorities for EPA assistance. These agreements are intended to help the Tribes and EPA develop multi-year plans for tribal assumption of environmental programs and EPA direct implementation of environmental programs in Indian country. The Administrator's July 1994 Action Plan for the EPA Indian Program makes TEAs the cornerstone on which Regions and National Program Managers are to build their Indian programs. TEAs and other similar agreements may take on added importance when used in the context of PPG grants.

On March 20, 1995, AIEO issued a template providing guidance on developing TEAs for the Regions and tribes. The guiding principles identified in this template are listed below.

- As these agreements are developed, all principles included in EPA's Indian policy shall apply. This includes recognition of a trust responsibility, government-to-government relationship, and tribal sovereignty.

- The government-to-government relationship shall be directly between the Agency and a specific tribe.

- The Agreement shall be implemented to promote stability in funding, employment, capacity building, infrastructure development, and other such factors that lead to long-term program implementation for the tribes.

- These agreements are being developed with the understanding that the long-term goal is to address, implement, and maintain—where deemed necessary by the Tribe—the full range of EPA's programs to protect public health and the environment.

- While implementing the agreement, the Agency is committed to ongoing, timely, and open communications with the Tribe. All efforts will be made to provide timely advice on available grants and other sources of funding, training, and ongoing meetings that affect tribes. This also includes a timely transfer of state-of-the-art technology, such as computers and data systems, as the tribes seek to build capacity.

- The agreements are intended to promote flexibility while addressing the needs of the tribe and can be revisited as appropriate to ensure common sense approaches.

- The principles of environmental justice shall apply to these agreements. In general these principles call for the Agency to ensure that tribes are afforded all opportunities afforded to states, including procedures for tribal participation in the Agency decision-making process. In addition, environmental justice principles call for a recognition of tribal cultural concerns such as subsistence needs and traditional uses of natural resources.

The importance of the TEAs cannot be overstated. They recognize EPA's relationships with each tribe individually, and thus are helpful planning tools for both the tribes and EPA. The TEAs are examples of EPA's commitment to using community-based approaches to environmental protection.

Baseline Assessment Project. To establish a national picture of environmental conditions in Indian country, AIEO initiated a national environmental baseline assessment project. The purpose of the Baseline Assessment of Indian country is to assemble, in an easy to use and accessible format, the environment data identified as most important to support sound environmental planning and management, both for the tribes and for EPA. The major tasks of the workgroups are to 1) identify and summarize information we already know (or have collected) about environmental conditions in Indian country from tribes, EPA, Federal Government, and other sources; 2) determine what information is most important to know about environmental conditions in Indian country to support multimedia assessment and to support planning and management decisions; 3) design and implement a data management system to meet those information needs; and 4) design and implement a system to collect data that are important enough to expend limited EPA and tribal resources.

The EPA baseline assessment workgroup has completed an initial screening level inventory of existing data on environmental conditions in Indian country. Additionally, the EPA program offices identified 36 key and priority data sets that would help both EPA and tribes track the development of environmental management activities. AIEO is now moving to accumulate information for the 36 key priority data sets from EPA program offices, the EPA Regions, and other federal agencies.

Internal EPA Training. In a memorandum issued by Administrator Carol Browner, dated July 14, 1994, titled "Announcements of Actions for Strengthening EPA's Tribal Program ,"senior EPA officials were directed to develop a national training program for all staff and managers. The purpose of this training is to provide EPA employees with the necessary tools, knowledge, and understanding of Indian Affairs. Over the past several years, EPA's tribal program coordinators and managers have been conducting training sessions for program personnel titled, "Working Effectively with Tribal Governments." As part of this national initiative, EPA's American Indian Environmental Office conducted a 3-day national train-the-trainer session for EPA's Indian Program coordinators. New materials will provide EPA staff with a current understanding of tribal history and culture, federal Indian law, and EPA's Indian Policy, initiatives, and environmental programs. The training initiative is on-going, and program offices are strongly encouraged to initiate sustained efforts to assure workers are fully knowledgeable so they can effectively work with Indian tribes.

B. Tribal Assumption of Federal Environmental Programs

In EPA's 1984 Indian Policy, the Agency announced its support for tribal assumption of environmental programs under federal statutes, stating, among other things, that:

- the Agency will recognize tribal governments as the primary parties for setting standards, making environmental policy decisions, and managing programs for reservations, consistent with Agency standards and regulations; and

- as impediments in our procedures, regulations, or statutes are identified that limit our ability to work effectively with tribes consistent with this Policy, we will seek to remove those impediments.

The Agency has made great strides in implementing these goals. Since 1984, EPA has worked successfully to have provisions added to three environmental statutes—the Safe Drinking Water Act (SDWA), the Clean Water Act (CWA), and the Clean Air Act (CAA)—explicitly authorizing the Agency to treat tribes in the same manner as states for purposes of implementing various environmental programs. In addition, EPA has worked to amend the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to explicitly include a provision that affords tribes substantially the same treatment as states with respect to certain provisions of the Act. EPA also worked to amend the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) to provide for a role for tribes. Furthermore, under several statutes that have not been amended to explicitly allow for tribal programs (e.g., the Toxic Substances Control Act (TSCA), and the Emergency Planning and Community Right-to-Know Act (EPCRA), the Agency has taken the position that it has the discretion to approve tribes to implement certain programs in the same manner as states in order to fill a gap in how the statutes are implemented in Indian country.

As tribes move to develop enforceable environmental protection programs within Indian country, they typically undertake the following steps:

- establish the necessary regulatory framework by passing tribal environmental codes;
- draft the necessary regulations; and
- establish a body, if one does not already exist, that can ultimately seek tribal administrative or judicial sanctions to enforce the tribal law.

As of May, 1998, EPA has made 201 "treatment in the same manner as a State" determinations for 129 tribes, most of which involved findings that tribes are eligible for grants under the CWA and the SDWA. EPA has determined 21 tribes to be eligible to set water quality standards for surface waters within the boundaries of their reservations under the CWA. Several tribes have also submitted applications for programs to regulate public drinking water systems, underground injections of waste material, and point source discharges into surface waters. In addition, approximately 20 tribes operate pesticide certification or enforcement programs under cooperative agreements with EPA authorized by (FIFRA).

1. Congressional Authorization for Approval of Tribal Programs Under Environmental Statutes

EPA statutes that specifically allow for EPA authorization of tribal programs or a substantial role for Tribes are:

- Federal Insecticide, Fungicide, and Rodenticide Act (1978).
- Safe Drinking Water Act (1986);
- Comprehensive Environmental Recovery, Compensation, and Liability Act (1986);

- Clean Water Act (1987);
- Clean Air Act (1990).

In addition, in several instances, EPA has reasoned that even though Congress has not specifically provided for tribal assumption of environmental programs in legislation, the Agency has the discretion to allow for tribal programs. Two statutes, where the opportunity to apply for environmental programs has been extended to Indian tribes by this method are:

- Toxic Substances Control Act; and
- Emergency Planning and Community Right-to-Know Act.

EPA also attempted to extend this opportunity to tribes under RCRA. However, on October 26, 1996, the U.S. Court of Appeals for the D.C. Circuit in *Backcountry Against Dumps v. EPA* held that EPA does not have authority to review and determine the adequacy of a tribal solid waste landfill permitting program under Subtitle D of RCRA.[187] The court rejected EPA's argument that section 4005(c)(1)(C) of RCRA, which requires EPA to review and determine the adequacy of state permitting programs, could be interpreted to authorize review of tribal permitting programs. The court rejected EPA's argument that the statute is ambiguous and found that EPA's interpretation was in conflict with the plain language of the statute. Specifically, the court accepted petitioner's argument that the inclusion of Indian tribes within the definition of "municipality" and the exclusion of Indian tribes from the definition of "State" precluded EPA's interpretation of section 4005(c)(1)(C) as enabling authorization of tribal programs. Importantly, the court noted that, if RCRA had been silent as to tribes, the statute would have been ambiguous and EPA might have been authorized to review and approve tribal programs (if EPA could demonstrate that such an approach was reasonable in light of the statute's purposes). Thus, EPA believes it still has the authority to review and approve tribal programs under certain statutes that are silent with respect to tribes (e.g., the lead program under TSCA).

2. *Tribal-Specific Eligibility Criteria*

For tribes to assume many of EPA's major grant or regulatory programs, they generally must go through a process called "Treatment in the Same Manner as a State" (TAS).[188] TAS was first put into place through the 1986 and 1987 amendments to SDWA and CWA. These amendments called on the Agency to develop a process by which tribes could apply for grants and program authority. EPA established a TAS process for eligibility under various programs according to the criteria identified in SDWA and CWA. In 1990, Congress also included TAS provisions in the Clean Air Act Amendments. Generally the criteria are as follows:

- the tribe must be federally-recognized;
- the tribe must have or be able to exercise substantial governmental powers;

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[187] 100 F. 3d 147 (D.C. Cir. 1996).

[188] The General Assistance Program and certain other grant programs (e.g., grants under CWA § 104) do not require tribes to go through this process.

- the tribe must have or have been delegated jurisdiction over the area in question; and
- the tribe must be reasonably expected to have the financial, physical, and human resource capability to effectively implement a program.

In the initial years after establishing the TAS process, many tribes and EPA staff found the process to be overly burdensome. EPA has increasingly improved its own capacity to help tribes meet those eligibility requirements, and, in 1994, EPA developed the "TAS Simplification Rule."[189] Under this rule, EPA eliminated the need to meet all four criteria each time a tribe applies for a program. In general, once a tribe has been deemed eligible for one EPA program, it need only establish that it has jurisdiction and capability for each subsequent program. If a tribe does not have capability, it must have a plan for acquiring capability over time. This is required because each program may require different skills and activities to provide protection that meets the requirements of specific statutes and regulations.

"Treatment-as-States," the original term for the process, was changed to "Treatment in the Same Manner as a State" in response to tribes objecting to the original phrase. Many tribes commented that they are not "States"; rather, they have a unique relationship with the United States Government. (The revised TAS regulations have been included for your reference.)

3. Tribal Jurisdiction

Perhaps most important of the tribal-specific eligibility criteria is whether the functions to be exercised by a tribe are within the applicant tribe's jurisdiction. EPA asks tribes that are applying for regulatory programs to demonstrate in their applications that they have adequate jurisdiction over the areas to be regulated. Demonstrating jurisdiction over trust lands or lands owned by a tribe is usually relatively simple and uncontroversial. Tribes almost invariably have inherent sovereign authority to regulate both their members and their territory (although specific statutes may have affected this general principle for some tribes).

A more complex and controversial issue is whether a particular tribe has jurisdiction over nonmember activities on nonmember-owned fee lands within the boundaries of an Indian reservation. Jurisdiction over nonmember activities on fee lands may come from two potential sources: a tribe may have inherent authority over these activities; or Congress may, by statute, delegate federal authority to a tribe.

EPA has not construed the Clean Water or Safe Drinking Water Acts as delegations of federal authority to a tribe. Rather, under these statutes, EPA looks to see whether a Tribe has adequate inherent authority to run a program. In several cases, the Supreme Court has addressed the question of tribal inherent authority over nonmembers on fee lands. As discussed in chapter 2, in *Montana v United States*, the Supreme Court noted that "[a] Tribe may . . . retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the

[189] 59 Fed. Reg. 33469 (1994).

political integrity, the economic security, or the health or welfare of the tribe."[190] In the 1991 preamble to its water quality standards regulations, the Agency announced that, on a case-by-case basis, it will evaluate tribal assertions of authority over nonmember activities on fee lands based on the *Montana* impacts test. However, because it was uncertain at that time as to the precise nature of the impacts required under *Montana*, EPA stated in the 1991 preamble that it would look to see whether the impacts on the tribe are "serious and substantial."[191] In that preamble, EPA also made "generalized findings," based on the Agency's expertise, that impacts to water quality usually are serious and substantial. In addition, EPA noted that pollutants in surface water are quite mobile and that impacts to nonmember lands of a reservation are very likely to impair the tribal lands.[192]

Since 1991, EPA has approved under CWA several tribal eligibility applications for water quality standards programs covering waters on or adjacent to nonmember fee lands within a reservation. For example, in February 1995, EPA found that the Confederated Salish and Kootenai Tribes of the Flathead Reservation had demonstrated authority over all surface waters within the Reservation. Approximately 50 percent of the Flathead Reservation is held in fee title by nonmembers. The Reservation is centered on a valley, with mountains on the east and west side, and the Flathead River running down the center. The River is surrounded by trust lands and, thus, activities throughout the Flathead River watershed affect or may affect these trust lands around the River.

EPA's determination was based on its formulation of the *Montana* test, the Agency's generalized findings regarding the seriousness and mobility of water pollution, and specific examples of actual and potential impacts to tribal health and welfare from nonmember activities on fee lands within the Flathead Reservation. EPA also noted that the result of its decision had the positive effect of avoiding checkerboarded management within the Reservation.

In March 1996, a federal district court upheld EPA's determination that the tribe has authority to implement its water quality standards program over all waters on the Reservation, including those on or next to nonmember fee lands.[193] The court upheld EPA's legal test, the Agency's generalized findings, and the specific demonstrations of impacts on the Flathead Reservation. An important factor in this decision was EPA's expertise regarding the nature and effects of water pollution. On appeal, the Ninth Circuit Court of Appeals affirmed the decision on March 3, 1998.[194] On May 2, 1998 the State of Montana filed a petition for review by the Supreme Court.

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190 450 U.S. 544, 565 (1981)

191 56 Fed. Reg. 64876, 64877-79 (December 12, 1991).

192 *Id.*

193 Montana v. EPA. 941 F. Supp. 945 (D. Mont. 1996).

194 Montana v. EPA. 13 F. 3d 1135 (9th Cir. 1998).

Congress has broad authority over tribal affairs and may, by statute, delegate federal authority to a tribe. Such a delegation could provide a federal statutory source of tribal authority that would not depend on the tribe's inherent authority. In *United States v. Mazurie*, 419 U.S. 544 (1975), the Supreme Court examined whether the federal government can delegate federal authority to tribal governments over activities in Indian country, including activities of non-Indians within reservation boundaries.[195] The issue was raised in the *Mazurie* case in the context of the regulation of alcoholic beverages in Indian country. The Court found that Congress may delegate federal authority to regulate the sale of alcoholic beverages in Indian country by non-Indians even though the activity occurred on nonmember fee land within the boundaries of the reservation.[196]

In contrast to CWA and SDWA, EPA has taken the position in the Tribal Authority Rule under CAA—based on several provisions of the statute and legislative history—that CAA constitutes a delegation of Congressional authority to eligible tribes to run air programs over their entire reservations, including fee lands.[197] Under that regulation tribes may also run programs on non-reservation lands over which they can demonstrate jurisdiction. The Tribal Authority Rule has been challenged in the U.S. Court of Appeals for the D.C. Circuit.

C. Direct Federal Implementation

The Agency's Indian policy states that:

> Until Tribal Governments are willing and able to assume full responsibility for delegable programs, the Agency will retain responsibility for managing programs for reservations (unless the State has an express grant of jurisdiction from Congress sufficient to support delegation to the State Government).

Given that environmental program responsibility requires capability and significant resources, tribes do not always find it practical to assume full responsibility for EPA programs. Based upon a variety of factors, often including program costs, assistance and maintenance costs and availability of technical expertise, tribal governments may select certain high-priority activities, but may decide not to assume an entire regulatory program. When tribes decide not to undertake certain activities under EPA's programs or not to apply for entire programs, EPA will seek to directly implement the environmental management programs.

The following is an illustrative selection of some tools that are available for direct federal implementation:

- communications with tribes;

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[195] 419 U.S. 544 (1975).

[196] *Id.*

[197] Indian Tribes: Air Quality Planning and Management; Final Rule, 63FR7254 (1998).

- establishment of Tribal-EPA Environmental Agreements (TEAs) that identify tribal priorities and help with budget development;
- development of Regional and National Environmental Work plans based on TEAs;
- development of Regional strategies so that direct implementation is consistent with tribal priorities; and
- training of management and regional staff.

Below are several success stories that document instances in which direct implementation is occurring.

- Many Regions assist with the regulation of drinking water sources and of underground injection wells that can affect drinking water, surface water, and ground water sources.

- Region 8 provides staff to visit reservations and to provide compliance and enforcement services under the Underground Storage Tank Program of the Resource Conservation and Recovery Act.

- On the Colville Indian Reservation, Region 10, in conjunction with the tribe, has established federal water-quality standards and is issuing discharge (NPDES) permits for the navigable waters within the exterior boundaries of the reservation.

The Clean Air Act: Air Quality Planning and Management (Final Rule) issued February 12, 1998, authorizes eligible tribes to implement their own air programs and to be treated in the same manner as states under the provisions of the Clean Air Act. This final rule will provide to tribes with approved CAA programs the authority over all air resources within a reservation (including non-Indian owned fee lands). Under this Final Rule, the criteria for a tribe's eligibility for treatment in the same manner as a state include demonstrating that a tribe is federally recognized, has a governing body that performs substantial governmental duties and powers, and is capable of implementing a program consistent with the Clean Air Act and its regulations. Other significant features of this final Clean Air Act rule include the following:

- tribes may implement portions of the CAA programs most relevant to tribal needs;

- tribes may develop more stringent requirements in their air programs;

- federal implementation of CAA in Indian country may be established if tribes choose not to develop their own program; and

- tribes may continue to seek financial assistance to support their air programs under section 103 and 105 of the Clean Air Act, and the Agency's General Assistance Grants Program (GAP).

A fact sheet on this final rule is included in the Appendix.

D. Cooperative Approaches To Implementation

The components of EPA program implementation discussed above all include a significant degree of cooperation between EPA and tribes. In some situations, tribes and states, along with EPA, may also work together to protect human health and the environment in Indian country through cooperative agreements. There may be considerable flexibility in the ways tribes, states and EPA can work together under such agreements.

Tribal-state relations are often complex. As a result of differing legal views about their respective jurisdictions, tribes and states often find themselves competing aggressively for authority, particularly with regard to nonmembers and nonmember-owned land. Nonetheless, state-tribal cooperative agreements can be an effective strategy for implementing a sound environmental program that avoids addressing difficult jurisdictional questions, provided that the parties do not compromise important political or legal rights.

Despite jurisdictional differences, it is important to note that many points of agreement and cooperative partnership between states and tribes can be negotiated to the mutual satisfaction of both parties. Usually, these agreements have focused on information exchanges and transboundary coordination, much like agreements commonly reached between states. In the 1994 Survey of Tribal Water Quality, the National Indian Policy Center noted that one approach to tribal-state agreements is to avoid matters that depend upon jurisdiction:

> We know of several tribal-State agreements that avoid the jurisdictional issue altogether, while providing for information sharing, common regulatory standards and procedures, joint inspections, cross-deputization of environmental enforcement officials, prior notice and opportunity to comment on proposed permits, and a variety of other procedures that address the interests of both parties and enhance environmental protection.[198]

In one case, the tribal-state agreement simply included a jurisdictional disclaimer by the State over activities in Indian country. This agreement, the Navajo Nation-State of Arizona Agreement on Environmental Regulation, also allowed tribal environmental staff to use training opportunities offered by the State and provided internships for tribal staff in the Arizona Department of Environmental Quality.

Several important EPA documents pertaining to tribal-State cooperative agreements may also provide helpful guidance whenever EPA is asked to facilitate and/or be a signatory to such an agreement:

a) "Federal, Tribal and State Roles in the Protection and Regulation of Reservation Environments," signed by the EPA Administrator on July 10, 1991. See Appendix.

b) "Policy Guidance on Tribal-State Cooperative Agreements," signed by the Director of the American Indian Environmental Office (AIEO) on May 22, 1995. See Appendix.

c) "EPA Region 8 Policy for Environmental Protection in Indian country," which was developed by Region 8 in concert with the Office of Water and the Office of General

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[198] Grover, Stetson and Williams. National Indian Policy Center, Washington, D.C., September 1994.

Counsel and was signed by the Regional Administrator on March 14, 1996. Part VII of the Policy addresses Tribal-State-EPA Cooperative Agreements. See Appendix.

EPA managers and staff, who are involved in negotiating, drafting, or advising states and tribes on the development of tribal-State agreements and EPA-tribal-state agreements, should be familiar with the directives and guidance contained in these documents.

IV. ORGANIZATION OF EPA'S INDIAN PROGRAM

A. The American Indian Environmental Office

The American Indian Environmental Office, working with its regional components, is responsible for coordinating the Agency-wide effort to strengthen public health and environmental protection in Indian country. AIEO oversees development and implementation of the Agency's Indian policy . The office strives to ensure that all EPA Headquarters and regional offices implement their parts of the Agency's Indian Program in a manner consistent with EPA's trust responsibility regarding protection of tribal health and environment, administration policy to work with tribes on a government-to-government basis, and support of tribal self-governance. AIEO's responsibilities also include:

- providing oversight of multimedia program development grants to tribes under the Indian Environmental General Assistance Program Act;
- negotiating tribal-EPA Environmental Agreements that identify tribal priorities for building environmental programs and also for direct, EPA program implementation assistance;
- developing tools to help tribal environmental managers make decisions on environmental priorities;
- developing training curricula for EPA staff on how to work effectively with tribes; and
- working to improve communication between the Agency and its tribal governments in a number of ways, including assistance to Agency Offices as they consult more closely with tribes on actions that affect tribes and their environments, and support for regular meetings of EPA's Tribal Operations Committee.

EPA's Indian Program is implemented primarily by EPA Regions and Headquarter's program offices. However, AIEO is often called upon to help guide this process.

B. Regional Programs and Operations

Federally-recognized tribes reside in nine of the Agency's ten regions (Region 3 is the exception). Each of these nine regions has appointed a Regional Indian Coordinator, and some of the regions have established an Indian program office. Most of the regions have a Regional Indian Work Group that acts as a regional counterpart to the National Indian Work Group. Some regions have field staff to work directly with the tribes in their development and implementation of environmental programs. These field staff are sometimes referred to as Indian Environmental Liaisons or Circuit Riders, depending on the region. Most of the regions have also established a regional counterpart to the Tribal Operations Committee. Some regions have a formal Regional Tribal Operations Committee (RTOC) comprised of tribes residing within that

region, while others have instituted regular meetings between tribal leaders and the region's senior management. Some regions have both an RTOC and regular all-tribes meetings.

C. Tribal Operations Committee

In order to improve communications and build stronger partnerships with the tribes, the Agency established the Tribal Operations Committee (TOC) in February 1994. The TOC comprises 19 tribal leaders or their environmental program managers (the tribal caucus) and EPA's Senior Leadership Team, including the Administrator, the Deputy Administrator, and the Assistant and Regional Administrators. The TOC meets on a regular basis to discuss implementation of the environmental protection programs for which EPA and the tribes share responsibility as co-regulators. All tribes are encouraged to communicate with the members of the TOC tribal caucus. Although the TOC is an important and effective vehicle for enhancing communications between EPA and the tribes, it is not a substitute for Agency consultation with individual tribes in accordance with the Administration policy of working with Indian tribes on a government-to-government basis.

D. Agency Senior Indian Program Managers

This group is chaired by the Assistant Administrator for Water (as the Assistant Administrator for the National Indian Program) and includes a senior manager designated by each Assistant Administrator and Regional Administrator and the Director of the American Indian Environmental Office. This group meets once a month via teleconference to discuss pressing or nationally-significant issues, policy, and program direction, and to exchange information between Headquarters and regions. The group was established to help the Agency meet the Administrator's high expectations for progress on strengthening the Agency's Indian Program and to help identify any program weaknesses.

E. National Indian Work Group

The role of the National Indian Work Group (NIWG) was initially defined in the *1984 Indian Policy Implementation Guidance.* The NIWG is chaired by the Director of the American Indian Environmental Office and is composed of representatives from regional and program offices, generally the Indian Coordinator. NIWG was established to facilitate and coordinate efforts to identify and resolve policy and programmatic barriers to working directly with Indian tribes; implement comprehensive tribal environmental programs; identify priority tribal projects; and perform other services in support of the Agency managers in implementing the Indian policy. NIWG holds regular biweekly conference calls and usually meets at least once each year.

F. National Indian Law Work Group

The National Indian Law Work Group (NILWG) is the counterpart to the National Indian Work Group. It addresses legal issues that arise in the course of developing and implementing the Agency's Indian Program. The NILWG is composed of lawyers from EPA's regional counsel and program offices, the Office of General Counsel, the Office of Enforcement and Compliance Assurance, and from the Department of Justice who work on federal Indian law issues. The group also includes policy staff from

AIEO and other EPA offices. NILWG meets once a month via teleconference to discuss pressing or nationally-significant Indian law issues related to environmental protection and to exchange information on common issues and problems. Also, NILWG usually meets face-to-face once each year.

G. American Indian Advisory Council

The American Indian Advisory Council (AIAC) is a Special Emphasis Program Council organized under the Office of Civil Rights. The central purpose of AIAC is to serve as an advisory group to the Administrator of EPA to recommend actions that address concerns of American Indians in the EPA workforce, and of the Indian tribes. Membership is open to all employees of EPA.

H. National Environmental Justice Advisory Council Indigenous Peoples Subcommittee

The National Environmental Justice Advisory Council (NEJAC) was charted as a Federal Advisory Committee in 1993. The Council has 25 representatives from key environmental justice constituencies, including community-based groups, business and industry, academic and educational institutions, tribal governments, state and local governments, and nongovernmental organizations. The Council has six subcommittees, one of which is the Indigenous Peoples Subcommittee. This Subcommittee has eight members with a diversity of backgrounds, such as tribal government, indigenous grassroots groups and environmental organizations, tribal business and industry, academia, and state government. This Subcommittee is primarily focused on reviewing Agency actions to address environmental justice and developing recommendations for bringing about environmental justice in Indian country.

I. Other EPA Advisory Councils With Tribal Representation

EPA has numerous federal advisory councils that have been chartered to address various environmental issues, from the Grand Canyon Visibility Transport Commission to the Common Sense Initiative. Many of these advisory councils have now appointed at least one tribal representative, but some groups still lack tribal representation. These stakeholder forums offer an additional mechanism for obtaining general tribal input on a variety of EPA issues.

V. TRIBAL OPERATIONS IN OTHER SELECTED FEDERAL DEPARTMENTS AND AGENCIES

A. White House Domestic Policy Council

The Domestic Policy Council has established a Working Group on American Indians and Alaska Natives to coordinate efforts across the federal Executive Branch to address key issues affecting Indian country. The Working Group is chaired by the Secretary of the Interior and is composed of Secretary and Assistant Secretary-level representatives from each of the federal departments/agencies with responsibility for American Indian and Alaska Native issues. The Working Group has five subgroups, including one on the

Environment and Natural Resources, which is co-chaired by the Director of the EPA American Indian Environmental Office and the Assistant Secretary for the Bureau of Indian Affairs.

B. White House Council on Environmental Quality

The Council on Environmental Quality (CEQ) is primarily responsible for overseeing the implementation of the National Environmental Policy Act (NEPA) and coordinating environmental issues across the federal Executive Branch. Thus, CEQ plays an important role in the protection of tribal environments, since the responsibility for this protection is shared by many federal departments and agencies. Also, issues regarding the implementation of NEPA have played a prominent role in the management of Tribal environments. In recent years, CEQ has been working with EPA to strengthen the tribal role under NEPA and to ensure consultation with affected tribes when a federal department of agency is developing NEPA documents.

C. Department of the Interior

The Department of the Interior (DOI) has multiple Offices and Bureaus that have significant responsibilities relating to Indian tribes. Primarily, the Bureau of Indian Affairs has the lead for the Federal executive on general Indian issues. In addition, the Office of American Indian Trust has the primary responsibility for overseeing the Federal Government's trust obligations, and the Assistant Solicitor for Indian Affairs has the primary role of furthering Indian legal issues and protecting Indian rights. Also, many of the land use and natural resource bureaus and offices at DOI have responsibilities for issues that affect tribal environments, such as the Bureau of Land Management, the Office of Surface Mining, the Fish and Wildlife Service, and the National Park Service.

D. Department of Justice

The Department of Justice (DOJ) plays a unique role in the protection of tribal environments and natural resources. Generally, DOJ will be requested by an agency referral to file a law suit on behalf of another Federal agency, such as EPA or DOI, or to defend such agencies against a suit. In the context of tribal environments, EPA and/or DOI have the option to request that DOJ take an enforcement action, when such an action is warranted by law, against a pollution source causing harm to tribal environmental resources. Given that most tribal environmental programs are in the early stages of development, this alternative method, as opposed to tribal enforcement, offers a potentially powerful tool for ensuring the protection of tribal environments. In order to handle litigation related to Indian tribes, DOJ established an Indian Resources Section within the Environment and Natural Resources Division. The Environmental Defense, Environmental Enforcement, and General Litigation Sections also play key roles in the Environmental and Natural Resources Division with regard to environmental litigation involving tribes. Also, DOJ recently established the Office of Tribal Justice to coordinate policy initiatives relating to tribes and to better promote issues of Federal Indian law.

In June 1995, the Attorney General issued the DOJ policy on Indian sovereignty and government-to-government relations with Indian tribes. The purpose of this policy is:

> To reaffirm the Department's recognition of the sovereign status of federally recognized Indian Tribes as domestic dependent nations and to reaffirm adherence to the principles of government-to-government relations; to inform Department

personnel, other Federal agencies, federally recognized Indian Tribes, and the public of the Department's working relationship with federally recognized Indian Tribes; and to guide the Department in its work in the field of Indian affairs.

E. Department of Health and Human Services

The Department of Health and Human Services (HHS) has two Offices that specifically handle Indian issues. The Indian Health Service (IHS) is a public health service designed exclusively to address Indian health issues. As part of many Indian treaties, the federal government guaranteed health care to Indian people in exchange for peace, friendship, and land. IHS has the primary responsibility of carrying out these treaty obligations. Among other services provided, IHS operates numerous hospitals throughout Indian country. The Administration for Native Americans (ANA) is a general Indian service organization that primarily manages various tribal grant programs. Most important to EPA is the ANA grant program for improving the capability of Indian tribal governments to regulate environmental quality. This program is similar to the Agency's General Assistance Program in that it is meant to help tribes develop their overall capacity to implement environmental programs. IHS plays an important role on sanitation issues, especially drinking water and sewer issues, and solid waste disposal. IHS has special authority to compact with tribes under the Indian Self-Determination and Education Assistance Act (ISDEA) for waste water and drinking water facilities. IHS is often linked to funding provided by EPA under the Clean Water Act's Indian Set-Aside program. With landfills, IHS has traditionally been involved with designing and setting up landfills on reservations, and has inventoried landfill problems pursuant to the Indian Lands Open Cleanup Act of 1993.[199]

F. Department of Defense

The Department of Defense (DOD), like DOI, has many activities related to its mission that affect Indian lands. Many DOD facilities, such as military bases, bombing ranges, overflight areas, and laboratories are located on or adjacent to Indian lands. In order to begin addressing some of the environmental harm that has resulted from these facilities, DOD now manages a tribal grant program for the mitigation of environmental impacts to Indian lands due to Department of Defense activities. In addition, Tribes are also impacted by actions taken by the Army Corps of Engineers (ACE). Tribes have been impacted by ACE projects such as the construction of dams that result in the flooding of reservations and ceded territory and the issuance of dredge and fill permits for wetlands within the tribes' watersheds.

G. Department of Agriculture

The United States Department of Agriculture (USDA) has taken some important strides in working with the Indian Nations. In recent years, the USDA has dramatically increased outreach and program delivery to Indian country residents. For instance, within the Rural Development Mission Area (formerly known as "Farmers Home Administration"), home ownership programs have been modified to better meet the needs of Native Americans living on trust lands. Increased emphasis has been placed on loan assistance and

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[199] 25 U.S.C. § 3901-3908.

leveraging funds, tribal government consultation regarding housing development issues, and the introduction of culturally-appropriate housing design. Additionally, increased emphasis has been placed on economic development activities and programs in Indian country. Finally, the USDA continues to work with other federal agencies in cooperative efforts designed to meet the needs of tribal governments (examples of this can be seen in inter-agency agreements, etc.).

Resource Guide Appendix Contents

- President Clinton's Memorandum-- "Government-to-Government Relations with Native American Tribal Governments" (April 29, 1994)
- "EPA Policy for the Administration of Environmental Programs on Indian Reservations" William D. Ruckelshaus (November 8, 1984)
- "EPA Indian Policy" Administrator Carol Browner's Memorandum (March 14, 1994)
- Executive Order 12898-- "Federal Actions to Address Environmental Justice in Minority Populations and EPA Policy for the Administration of Environmental Programs on Indian Reservations" (February 11, 1994)
- Executive Order 13007-- "Indian Sacred Sites" (May 24, 1996)
- "Federal, Tribal and State Roles in the Protection and Regulation of Reservation Environments" Concept Paper by Administrator William K. Reilly (July 10, 1991)
- Administrator Browner's Tribal Action memorandum-- "Announcement of Actions for Strengthening EPA's Tribal Operations" (July 14, 1994)
- EPA Strategy in Response to Executive Order 12898 (April 1995)
- "EPA Region 8 Policy for Environmental Protection in Indian Country" (March 14, 1996)
- Memorandum of Understanding Among BIA, EPA and IHS
- GAP Distribution Table and Memorandum by EPA Assistant Administrator Perciasepe (March 26, 1998)
- Performance Partnership Grants program description
- Template for Environmental Agreements (TEA) Memorandum by Terry Williams, AIEO (March 20, 1995)
- "Indian Tribes: Air Quality Planning and Management; Final Rule" Federal Register Notice
- Executive Order 13084 "Consultation and Coordination with Indian Tribal Governments" (May 14, 1998)

Facility Summary for Facility ID # 0000518

Owner Name and Address: WHITE MOUNTAIN APACHE P.O. 700 Whiteriver AZ 85941

Facility ID	Location Name	Location Street Address	Location City	Zip
0000518	FORT APACHE TIMBER COMPANY CIB	202 S. COOLEY RD	Show Low	85911

Tank ID / Status	Installed / Age(yr)	Product / Capacity	Tank Mat'l of Construction / Secondary Option	Piping Material / Secondary Option	Piping Type	Tank Release Detection / Piping Release Detection	FR Met / Spill/Overfill/
1	1/1/1941	Gasoline	Asphalt Coated or Bare Steel	Bare Steel	Safe Suction	A B C D E F G H I J K ●	Yes
Permanently Out of Use	58	6,000	None	None		B D E F G H I J K ●	No No No
2	1/1/1941	Diesel	Asphalt Coated or Bare Steel	Bare Steel	Safe Suction	A B C D E F G H I J K ●	Yes
Permanently Out of Use	58	10,000	None	None		B D E F G H I J K ●	No No No

Tank/Piping Release Detection Codes

A Manual Tank Gauging	C Inventory Control	E Vapor Monitoring	G Interstit. Dbl-Wall Monitor	I SIR	K Deferred
B Tank/Line Tightness Testing	D ATG/Auto Line LD	F GW Monitoring	H Interstit. Sec. Con. Monitor	J Other Methods	L Not Listed

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